92-1318

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

NELSON R. RABY, *et al.*,

Petitioners,

v.

M/V PINE FOREST, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Civil Appeal Nos. 90-35618, 90-35879, 91-35375

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit erred when it held that truth is an absolute defense to the tort of blacklisting?

2. Whether the United States Court of Appeals for the Ninth Circuit erred (a) when it failed to assign reasons for reversing the district court's finding that back wages were due, and (b) when it narrowly interpreted the provisions of the Seaman's Wage Act to find the Act inapplicable to a foreign flagged vessel which derived 100 percent of its income from voyages to the United States.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners

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TABLE OF CONTENTS

Questions Presented i

List of All Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Proceedings in the Case Below 1

Jurisdictional Statement 1

Authorities Considered 1

Statement of the Case 3

Argument in Favor of Granting Petitioners' Application for Writs 7

A. Blacklisting and the Defense of Truth 11

B. The Narrow Interpretation of the Provisions of the Seaman's Wage Act and Failure to Assign Reasons for Reversal of the Award of Back Wages Due 22

1. The Court of Appeals clearly erred when it failed to assign reasons for reversing the award of back wages 22

2. The Court of Appeals narrowly interpreted the Seaman's Wage Act to defeat the cause of action for penalty wages thereunder ... 24

Conclusion 30

Appendix A1

TABLE OF AUTHORITIES

Page

CASES

American Foreign S.S. Co. v. Matise, 488 F.2d 469 (9th Cir. 1974), reversed on other grounds, 423 U.S. 150 (1975) 8

Anderson v. Bessemer City, 470 U.S. 564 (1985) 23

Angad v. M/V Fareast Trader, 1989 AMC 2721 (S.D.Tex. 1989) 17

Arguelles v. U.S. Bulk Carriers, 408 F.2d 1065 (2d Cir. 1969), affirmed 400 U.S. 351 (1971) 16

Beasley v. Texas & P&R Co., 191 U.S. 492 (1903)..... 9

Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957)..... 19

Burie v. Overseas Navigation Corp., 205 F.Supp 182 (S.D.N.Y. 1962) 28

Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031, 1033 (9th Cir. 1970)..... 20

Carroll v. Protection Maritime Ins. Co., Ltd., 512 F.2d 4 (1st Cir. 1975) 12

Chung Yong Il v. Overseas Navigation Co., 774 F.2d 1043 (11th Cir. 1983), *cert. denied* 474 U.S. 1177 (1986) 27

Collie v. Fergusson, 281 U.S. 52 (1930)..... 8

Fitzgerald v. Liberian S/T Chryssi P. Goulandris, 582 F.2d 312 (4th Cir. 1978)..... 8

Griffin v. Oceanic Contractors, 458 U.S. 564 (1982) 7, 16, 27, 28

TABLE OF AUTHORITIES – Continued

Page

John Hancock Mut. Life Ins. Co. v. National Labor Relations Board, 191 F.2d 483, 485 (D.C. Cir. 1951) 20

Jose v. Fir Grove, 801 F.Supp. 1015 (D.Or. 1992) 6, 11

La Bourgogne, 210 U.S. 95 (1908) 26

Masoni v. Board of Trade of San Francisco, 260 P.2d 205 (Cal. App. 1953)..... 14

McCrea v. U.S., 294 U.S. 23 (1935)..... 8

McCulloch v. Sociedad Nacional Marineros de Honduras, 372 U.S. 10 (1963)..... 19

Miles v. Apex Shipping, ___ U.S. ___, 111 S.Ct. 317 (1990) 8

NLRB v. Schill Steel Products, 480 F.2d 586, 594 (5th Cir. 1973) 21

NLRB v. Searle Auto Glass, Inc., 762 F.2d 769 (9th Cir 1985)..... 21

Ostrofe v. H.S. Crocker Co., Inc., 670 F.2d 1378 (9th Cir. 1982) 20

Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245 (1916) ..8, 27

Patterson v. Bark Eudora, 190 U.S. 169 (1903)..... 8

Pino v. Protection Maritime Ins. Co., Ltd., 599 F.2d 10 (1st Cir. 1979) 12, 15, 21

Scussel v. Balter, 386 So.2d 1227, 1228 (Fla. App. 1980)..... 15

Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057 (5th Cir. 1981)..... 12, 19

Smithers v. Metro-Goldwyn-Mayer Studios, Inc., 139 Cal.App.3d 643, 189 Cal.Rptr. 20 (1983) 14

TABLE OF AUTHORITIES – Continued

Page

Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920) 8, 16, 17, 28

The Black Eagle and Concordia, 87 F.2d 891 (1937) 26

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987) 9

Vaughn v. Atkinson, 369 U.S. 527 (1962)..... 6

Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U.S. 643, 9 S.Ct. 402.....9, 10

Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967) 20

Yaindl v. Ingersoll-Rand Co., 422 A.2d 611, 623, 624 (Pa. Super. 1980) 16

CONSTITUTIONS

Ariz. Const. art.18, § 9 13

N.D. Const. art. XII, §§ 17,19 13

Utah Const. art. XII, § 19, art. XVI § 4..... 14

STATUTES

Act 23 Stat. 53 (June 26, 1884)..... 17

F.R.C.P. Rule 52(A) 23

28 U.S.C. § 1254..... 1

28 U.S.C. § 1331..... 4

28 U.S.C. § 1333..... 4

29 U.S.C. § 158 (a)(3-4) 19

29 U.S.C. § 215..... 19

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 660 19
45 U.S.C. § 60 19
45 U.S.C. § 441(a) 19
46 U.S.C. § 183 26
46 U.S.C. § 10313 ..... *passim*
46 U.S.C. § 10314 10
46 U.S.C. § 10315 10
Ala. Code § 13A-11-123 (1975) 13
Ariz. Rev. Stat. Ann. § 23-1361 (1983) 13
Ark. Stat. Ann. § 81-211 (1976) 13
Cal. Lab. Code §§ 1050, 1051 (West 1971) 13
Colo. Rev. Stat. § 8-2-111 (1973) 13
Conn. Gen. Stat. Ann. § 31-51 (West 1972) 13
Fla. Stat. Ann. § 351.20 (West 1968) 13
Ind. Code. Ann. §§ 22-2-5-3, 22-5-3-1 (West 1981) 13
Iowa Code Ann. § 730.2 (West 1979) 13
Kans. Stat. Ann. § 44-117 (1981) 13
LA. Rev. Stat. Ann. § 23:963 (West 1964) 13
Me. Rev. Stat. Ann. tit. 17, § 401 (1983) 13
Minn. Stat. Ann. §§ 179.12 (6), 179.60 (West 1966) 13
Miss. Code Ann. § 77-9-752 (1972) 13
Mont. Code Ann. § 39-2-803 (1981) 13
Nev. Rev. Stat §§ 613-200, 613.210 (1981) 13

TABLE OF AUTHORITIES – Continued

Page

N.M. Stat. Ann. § 30-13-3 (1978) 13

N.Y. Lab. Laws § 704-9 (consol. 1983) 13

N.C. Gen. Stat. § 14-355 (1981) 13

Ohio Rev. Code Ann. § 1331.02 13

Okla. Stat. Ann. tit 40, § 172 (West 1954) 13

Ore. Rev. Stat. § 659.230 (1981) 14

R.I. Gen. Laws § 28-7-13(9) (1979) 14

Tenn. Code Ann. § 50-1-202 (1983) 14

Tex. Rev. Civ. Stat. Ann. art. 5196(1) (Vernon 1971) 14

Utah Code Ann. §§ 34-24-1, 34-24-2 (1971) 14

Va. Code § 40.1-27 (1981) 14

Wash. Rev. Code Ann. § 49.44.010 (1962) 14

Wis. Stat. § 134.02 (1981) 14

Restatement, First of Torts 15

Restatement, Second of Torts, § 772 ..... 12, 14, 15, 16

OTHER AUTHORITIES

Amicus Brief of the U.S. in *Strathearn v. Dillon*, 252 U.S. 348 (1920) 28

Bickell, *Strathearn S.S. Co. v. Dillon, An Unpublished Opinion*, 69 Har.L.Rev. 1177 .....16, 28

Chapman, *Trouble on Board* (Cornell University 1992) 11

TABLE OF AUTHORITIES – Continued

Page

Forsyth, *The American Merchant Marine and His Industry* (New York: Taylor & Francis New York 1989) 16

Green, *The Torts Restatement*, 29 Ill.L.Rev. 582 (1935) 15

Holloway, William J., and Michael Leech, *Employment Termination: Rights and Remedies* (Washington, D.C.: The Bureau of National Affairs, Inc. (1985) 13, 14, 21

Milner, *Restatement: The Failure of a Legal Experiment*, 20 U.Pitt.L.Rev. 794 (1959) 15

Prosser & Keeton, *The Law of Torts*, 17 (5th ed. 1984 & Supp. 1988) 15

PROCEEDINGS IN THE CASE BELOW

The district court opinion in *Raby v. M/V Pine Forest* is reported in part at 1990 A.M.C. 2441 (W.D. Wa. 1990) [transcribed in full in appendix]; on supervisory writs to the United States Court of Appeals for Ninth Circuit, *Raby v. M/V Pine Forest* reported at 918 F.2d 80 (9th Cir. 1990); cert. denied. ___ U.S. ___, 114 L.Ed.2d 101 (1991); on appeal to the United States Court of Appeals for the Ninth Circuit, *Raby v. M/V Pine Forest*, consolidated with *Su v. M/V Southern Aster*, reported at 978 F.2d 462 (9th Cir. October 14, 1992), rehearing denied on December 9, 1992.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit, sought to be reviewed herein, was issued on October 14, 1992; application for rehearing was denied on December 9, 1992. The jurisdiction of this Honorable Court is predicated on 28 U.S.C. § 1254, Writs of Certiorari to the United States Courts of Appeals.

AUTHORITIES CONSIDERED

46 U.S.C. § 10313, in pertinent part (set forth in its entirety in the appendix), reads:

* * *

> "(e) After the beginning of a voyage, a seaman is entitled to receive from the master, on demand, one half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the

expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed . . .

* * *

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section."

STATEMENT OF THE CASE

Plaintiffs, thirteen (13) Filipino seamen who served aboard the vessel M/V Pine Forest, a bulk carrier, flying the flag of Vanuatu, instituted this action in the United States District Court for the Western District of Washington for unpaid wages and statutory penalties pursuant to 46 U.S.C. § 10313, and for claims of intentional tortious conduct by the shipowner, including blacklisting under the general maritime law. Named Defendants are the vessel M/V Pine Forest, *in rem*, and its owners and operators, Inui Steamship Co., Ltd. and Delica Shipping, S.A. The district court clearly found that the M/V PINE FOREST was a new ship in which plaintiffs were engaged for the maiden voyage. Each of the subsequent voyages was from Japan to the United States and back, the purpose of which was to carry logs and wood products from the Pacific Northwest to Japan. As a result thereof, 100% of the business transacted by the vessel was from commerce with the United States. Plaintiff seamen were required to sign two sets of portage bills or wage receipts monthly, one set falsely acknowledging receipt of the amount of wages due under the shipping articles, and the other reflecting the actual lower amount paid to each Plaintiff, all in violation of United States, Vanuatu and international law. Defendants maintained a policy of terminating any seaman that refused to participate in the double bookkeeping scheme and blacklisting that seaman from ever being employed again as a merchant seaman. Upon the arrest of the vessel, Defendants partially paid the seamen's wages stipulated in the shipping articles which were subject to the suit and then promptly counterclaimed for the return of these wages. In accordance with

its established policy, the Defendants blacklisted Plaintiffs from ever working again as merchant seamen by making truthful notations in each of the Plaintiff's Seaman's Book while they were still on a vessel in a U.S. harbor. While the notations were truthful, "Requested repatriation upon filing wages claim to arrest vessel", the district court found that Defendants made the notations with the motive and intent to blacklist Plaintiffs in retaliation for Plaintiffs seeking the protection of the Seaman's Wage Act, 46 U.S.C. § 10313. Jurisdiction of the district court was invoked on federal question jurisdiction, 28 U.S.C. § 1331, and the Saving to Suitor's Clause of Admiralty and Maritime Jurisdiction, 28 U.S.C. § 1333, for claims under the Seaman's Wage Act, 46 U.S.C. § 10313.

As regards each of the questions presented, the following facts are germane:

The district court explicitly found that Defendants made the notation, "Requested repatriation upon filing wages claim to arrest vessel" in their Seaman's Books with the motive and intent of blacklisting Plaintiffs and prohibiting Plaintiffs from obtaining any future employment as merchant seamen as retaliation for Plaintiffs bringing the action to recover their wages under 46 U.S.C. § 10313. The district court expressly found that Defendants' conduct "was for retaliation and punishment of the Plaintiffs for requesting what they were lawfully entitled to – their wages" and that Plaintiffs were not able to be employed as merchant seamen because of Defendants' blacklisting. The Ninth Circuit reversed, holding that the truthfulness of the notations was an absolute defense to Plaintiffs' claims for blacklisting, regardless of Defendants' illegitimate motive or intent and Plaintiffs' resulting unemployability.

The trial court explicitly found that after the arrest and partial payment of wages, the Defendant vessel and its owners, Delica Shipping and Inui Steamship Co., Ltd., were still in arrears for wages due in an amount of $23,696.00, and that the wages were withheld without sufficient cause in violation of 46 U.S.C. § 10313. The Ninth Circuit reversed, without any explanation whatsoever.

The district court explicitly found that the M/V Pine Forest made eight (8) separate voyages from Japan to the United States and that Plaintiffs had legally demanded one-half wages each time the M/V Pine Forest was in a United States port in accordance with 46 U.S.C. § 10313(e). The district court found that the Defendants wrongfully refused the demand for one-half wages entitling the seamen to full wages and double wages. The Ninth Circuit reversed holding that there was insufficient demand for one-half wages which precluded the application of the half wage statute, 46 U.S.C. § 10313(e).

The district court found that Defendants illegally withheld wages at the end of each of the eight (8) separate voyages from Japan to the United States in violation of the full wage statute, 46 U.S.C. § 10313(f). The district court found that each separate trip was a "voyage" and that the term "cargo" in the wage statute was broad enough to encompass the term "ballast". The court of appeals reversed and found that the term "voyage" encompasses the time a seaman commences to work on board a ship and ends only upon completion of the contract or by premature discharge. Additionally, the Ninth Circuit reversed on the basis that ballast on board the M/V Pine Forest (sea water) was worthless and thus not cargo under the Act.

At the trial of this matter, the district court found for Plaintiffs in the total sum of $32,657,006.00, for wages, double wages, and damages, including punitive damages for their willful and wanton acts of blacklisting. Defendants moved for a supersedeas bond to stay execution of the judgment pending an appeal to the United States Court of Appeals of the Ninth Circuit. The appeal on the merits was rendered on October 20, 1992, and the court of appeals reversed the judgment in its entirety except for the award of attorney fees under this Court's decision in *Vaughn v. Atkinson*, 369 U.S. 527 (1962).

In an attempt to morally justify its holding, the Ninth Circuit in its introduction to the litigation mischaracterizes it as "an ongoing dispute between shipowners and International Transport Workers' Federation" stating that "if the owners fail to pay the union rate, the unions will sometimes interfere with the loading and unloading of ships." The Ninth Circuit completely ignored the record of this litigation, as it was uncontradicted that no union inspector *ever* inspected the M/V Pine Forest, nor had any vessel owned by the Defendants ever been detained or interfered with by the ITF or its affiliates. Indeed, the shipowner testified that it had never experienced any ITF interference and that its definition of "union harassment" was any time a seaman asked for their wages due under the shipping articles. This particular shipowner did not devise the defense of "the union is evil and made me do it" until the subsequent litigation in *Jose v. Fir Grove*, 801 F.Supp. 1015 (D.Or. 1992). Then, after considerable evidence as to the role of the International Transport Workers' Federation and foreign shipowners, the district court in *Jose* rejected Defendants' contentions. The M/V Fir Grove is a sister ship of the M/V Pine Forest, owned

by the same Panamanian corporation and beneficially owned and operated by the same Japanese defendants as in this litigation.

The individual Plaintiffs herein continue to be unemployed and unemployable as a result of the conduct of the Defendants complained of herein.

ARGUMENT IN FAVOR OF GRANTING PETITIONERS' APPLICATION FOR WRITS

Rule 10 of the Rules of the Supreme Court provides that one of the special and important reasons for granting a writ of certiorari to review a court of appeal decision is when a United States Court of Appeal has rendered a decision in conflict with the decision of another United States Court of Appeal on the same matter. Petitioners request review by this Honorable Court on this basis and because of the underlying importance of seamen being able to obtain the protection of the Seaman's Wage Act as mandated by Congress without suffering the penalty of blacklisting. Petitioners respectfully submit that it is time again for this Court to address the complexities of 46 U.S.C. § 10313 as the last time this Court did so was in *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982), which was prior to its amendment and restatement in 1983.[1]

[1] The wage statute was amended in August of 1983 and is presently contained in 46 U.S.C. § 10313. It is clear that Congress intended that there be no substantive change in the law with the enactment of 46 U.S.C. § 10313 in 1983. *U.S. Code, Congressional and Administrative News*, Vol. 2, 98 Congress, 1st Session, 1983 "Legislative History", P.L. 98-89, Partial Revision of Title 46 U.S. Code, Shipping; see also, Report No. 98-56, 98th Congress, 1st Session, "Marine Safety and Seamen's Welfare", particularly,

The opinion of the Ninth Circuit of October 20, 1992, presents a clear conflict among the circuits and now subjects the fortunes of seamen wage litigation to a great extent upon the location of the suit. The Ninth Circuit decision is in direct conflict with the First Circuit, Fifth Circuit, and Eleventh Circuit; and as shown below it is in conflict with decisions of this Court. This Honorable Court in *Miles v. Apex Shipping*, ___ U.S. ___, 111 S.Ct. 317 (1990), noted the overriding concern for uniformity in maritime matters. Along with the desire for uniform approach in maritime matters, there is a constant desire for uniformity in the application of federal statutes and the general maritime law.

The Ninth Circuit decision punishes those that the statute was intended to protect by requiring a seaman to forego his right of future employment by claiming his wages and seeking the protection of 46 U.S.C. § 10313. The Ninth Circuit opinion allowed these Plaintiffs no recovery whatsoever and imposes new and impossible requirements for the application of 46 U.S.C. § 10313(e) and (f) to foreign vessels that earn 100% of their income

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"Purposes of Bill", p. 1, "Substantive Changes Not Intended", p. 10; see also, Congressional Record-Senate, S11 568, et seq., August 3, 1982, Comments of Senator Packwood.

The Seaman's Wage Act, unlike many other statutes, has received an inordinate amount of attention from this Court in the past because of its strategic importance both to United States merchant marine policy and because of its application to seamen who are traditionally viewed as wards of the court. See *Patterson v. Bark Eudora*, 190 U.S. 169 (1903); *Pacific Mail S.S. Co. v. Schmidt*, 241 U.S. 245 (1916); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920); *McCrea v. U.S.*, 294 U.S. 23 (1935); *Collie v. Fergusson*, 281 U.S. 52 (1930); *American Foreign S.S. Co. v. Matise*, 423 U.S. 150 (1975).

from trade with the United States. As a practical matter, the Ninth Circuit's opinion ratifies the actions of unscrupulous shipowners by making it economically advantageous to violate the general maritime law and international law by maintaining double books.

The practical and theoretical implications flowing from the decision in the instant case require careful consideration of public policy concerns. Because such public policy concerns extend to the interests of third parties, and especially unrepresented public interests, the court must not "lend its aid" to those who found their practices on "immoral or illegal acts". See, *Beasley v. Texas & P&R Co.*, 191 U.S. 492 (1903); and *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). To do so, undermines the integrity of the judiciary to the extent it endorses corrupting practices and condones flagrant attempts to evade the underlying purposes of federal law. The district court found that Defendants never intended to pay Plaintiffs their full wages and took the retaliatory action of blacklisting with the motive and intent of punishing Plaintiffs for having sought the protection of the Seaman's Wage Act. Defendants' conduct is repugnant to both the sanctity of contracts and public morality, and – if allowed to freely continue – must necessarily prove "corrupting in its tendency."

In matters of public transportation and commerce, this Court long ago recognized a contract as void as against public policy, which is "immoral in its conception and corrupting in its tendency." *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U.S. 643, 9 S.Ct. 402. In *Woodstock Iron Co.*, the Court held void a contract by an extension company (an employee of a railroad company) with a third party to violate its engagement with its

employer in locating and constructing a railroad and, instead of selecting the shortest, cheapest, and most suitable route, to locate the road by a longer route thereby imposing an unnecessary burden upon its employer. The Court further determined that the transaction on the part of the third party was nonetheless offensive because of the threats from the extension company that it would cause the road to be located in a different route.

As in *Woodstock*, Defendants conduct violated public policy and was "immoral in its conception and corrupting in its tendency". The deceit and corruption is compounded when the perpetrators purport to disregard prevailing maritime practices and general norms of international law which consider the shipping articles to be the proper contract of employment for the seamen who are signatories. The "corrupting tendencies" continue with instructions to seamen to lie to union inspectors and similar authorities, and other acts calculated to breed contempt for authority and flagrant disregard for both contractual obligations, as well as international law and the law of the port state, e.g., the federal law of the United States. In obtaining clearance from U.S. harbors on eight (8) separate occasions, the Defendants were required to present the shipping articles to U.S. authorities as required by 46 U.S.C. § 10314(d) and 46 U.S.C. § 10315(d).

The Ninth Circuit opinion condones an overt effort, designed and intended to evade the purposes and underlying public policies of United States law, namely the Seaman's Wage Act. The implications – both practical and theoretical – of the Ninth Circuit's approval of Defendants' conduct, extend far beyond the parameters of the instant case, embracing the very corrupting practices and

abuse of national interests which public policy presumes to protect.

A. Blacklisting and the Defense of Truth

The trial court found that the truthful notations made in each Plaintiff's Seaman's Book were with the motive and intent to punish Plaintiffs in retaliation for Plaintiffs' filing suit in the United States. The Ninth Circuit acknowledged this in the portion of its opinion holding the demand for one-half wages to be insufficient noting the testimony of the seamen that ". . . had they made their demands explicit, they would have been terminated." Interestingly, the Ninth Circuit noted the book by Reverend Paul K. Chapman, formerly the Director of the Center for Seafarers' Rights, Seamen's Church Institute of New York, and presently the Executive Director of the North American Maritime Ministry Association.[2] Regrettably, the court did not read the entire book which clearly establishes that a Philippine seaman complaining about his wage conditions suffers retaliation and blacklisting at the hands of the shipowners and is directly aided by both the Philippine manning agent and Philippine Government in seeing that this seaman never works again.[3]

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[2] The Ninth Circuit cited Reverend Chapman's book noting that the country of the vessel's flag, Vanuatu, "is well known for its unintrusive admiralty law." See Appendix A, p. 4, n. 1; see Chapman, *Trouble on Board* (Cornell University 1992).

[3] See Chapman, *Trouble on Board*, supra, pp. 27-28, 39-41, 70. See also, *Jose v. Fir Grove*, 801 F.Supp. 358, 360-365 (D.Or. 1992). In *Jose v. M/V Fir Grove*, the trial court on its own motion enjoined these same Defendants Delica Shipping and Inui Shipping from taking any steps to regain possession of the awards made by the court.

The court of appeal found that the district court's award of damages for blacklisting must be reversed because truth is an absolute defense to blacklisting regardless of motive or intent, citing the *Restatement (Second) of Torts*, § 772. The Ninth Circuit, in reversing the decision of the district court, relied solely on the Restatement and clearly ignored precedent of other circuits, including the decision of the United States Court of Appeals for the First Circuit in the cases of *Carroll v. Protection Maritime Ins. Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975); *Pino v. Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10 (1st Cir. 1979); and the decision of the Fifth Circuit in *Smith v. Atlas Off-shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). The general maritime law tort of "blacklisting" was first recognized in the cases of *Carroll* and *Pino*. Therein, the First Circuit found that an insurance company's deliberate interference with the future employment relationships of seamen who had brought Jones Act claims constituted inappropriate and unlawful interference, or blacklisting. In *Smith v. Atlas*, the Fifth Circuit held retaliatory action by shipowner resulting from the seaman's filing a Jones Act claim to constitute tortious conduct.

In the decision complained of below, both the Ninth Circuit and the First Circuit have found that a legal cause of action exists for "blacklisting" and the Fifth Circuit recognizes retaliatory action as tortious conduct. However, truth is only an absolute defense in the Ninth Circuit. Both the First and Fifth Circuits consider the motive and intent behind the act, and the consequences to the

seaman and the justification, if any, for the conduct. The rule of the Ninth Circuit that truth is an absolute defense for a seaman seeking the protection of the maritime wage statute ignores the traditional status of a seaman as the ward of the court, circumvents the policy of Congress in extending the wage statute to foreign seamen, and is at odds with the historical development of the tort of blacklisting.

The concept of blacklisting was originally associated with employer opposition to labor unions, and was a means of preventing possible union adherents from getting in the work place. Holloway & Leech, *Employment Termination: Rights and Remedies* 246 (1985).[4] Blacklisting, as an actionable form of interference with prospective economic advantage, has been prohibited in some form by almost all of the States of the Union.[5] The duty not to

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[4] Holloway, William J., and Michael J. Leech, *Employment Termination: Rights and Remedies* (Washington, D.C.: The Bureau of National Affairs, Inc. 1985).

[5] Ala. Code § 13A-11-123 (1975); Ariz. Const. art.18, § 9, Ariz. Rev. Stat. Ann. § 23-1361 (1983); Ark. Stat. Ann. § 81-211 (1976); Cal. Lab. Code §§ 1050, 1051 (West 1971) (by misrepresentation); Colo. Rev. Stat. § 8-2-111 (1973); Conn. Gen. Stat. Ann. § 31-51 (West 1972); Fla. Stat. Ann. § 351.20 (West 1968) (railroads only); Ind. Code. Ann. §§ 22-2-5-3, 22-5-3-1 (West 1981); Iowa Code Ann. § 730.2 (West 1979); Kans. Stat. Ann. § 44-117 (1981); LA. Rev. Stat. Ann. § 23:963 (West 1964) (no blacklist for failure to buy at designated store); Me. Rev. Stat. Ann. tit. 17, § 401 (1983); Minn. Stat. Ann. §§ 179.12 (6), 179.60 (West 1966); Miss. Code Ann. § 77-9-752 (1972) (railroad and telephone companies union membership); Mont. Code Ann. § 39-2-803 (1981); Nev. Rev. Stat §§ 613-200, 613.210 (1981); N.M. Stat. Ann. § 30-13-3 (1978); N.Y. Lab. Laws § 704-9 (consol. 1983); N.C. Gen. Stat. § 14-355 (1981); N.D. Const. art. XII, §§ 17,19; Ohio Rev. Code Ann. § 1331.02 (page 1979); Okla. Stat. Ann. tit

blacklist has been held to arise out of the duties of good faith and fair dealing found in the common law. See, e.g., *Smithers v. Metro-Goldwyn-Mayer Studios, Inc.*, 139 Cal.App.3d 643, 189 Cal.Rptr. 20 (1983). Because of the fear that any communication to another potential employer would result in tort liability, many of these statutes have generally recognized that a truthful response *to reference requests* may be made without liability. Holloway & Leech, *supra*, at 247. This is presumably the origin of the "truth" defense of § 772 of the *Restatement (Second) of Torts*, though the *Restatement* defense extends much further than simple requests for references from previous employers. The approach of the *Restatement*, however, allows any truthful statement to be privileged regardless of the legitimacy of the interest of the defendant in communicating that information to others.[6]

40, § 172 (West 1954); Ore. Rev. Stat. § 659.230 (1981); R.I. Gen. Laws § 28-7-13(9) (1979); Tenn. Code Ann. § 50-1-202 (1983) (union membership); Tex. Rev. Civ. Stat. Ann. art. 5196(1) (Vernon 1971); Utah Const. art. XII, § 19, art. XVI § 4, Utah Code Ann. §§ 34-24-1, 34-24-2 (1971); Va. Code § 40.1-27 (1981); Wash. Rev. Code Ann. § 49.44.010 (1962); Wis. Stat. § 134.02 (1981).

[6] The defense of truth created in § 772 developed out of a California case, *Masoni v. Board of Trade of San Francisco*, 260 P.2d 205 (Cal. App. 1953). See Reporter's Notes to § 722. The *Masoni* court recognized that conveyance of truthful information would not constitute tortious interference where the truthful information was presented as a legitimate concern "therein to secure payment of a legitimate debt." The absolute defense of truth has been criticized and did not form a part of the maritime law of the United States until the Ninth Circuit's decision in *Raby*.

Blind reliance on the *Restatements* by any court has been questioned, if not criticized, by several commentators, including Professors Prosser & Keeton's remarks:

> "The form of the Restatement is perhaps unfortunate, in that it seeks to reduce the law to a definite set of black-letter rules or principles, ignoring all contrary authority – since the law of torts in its present state of development does not lend itself at all readily to such treatment. There is room for suspicion that the courts tended to cite the Restatement when they are already in agreement with it, and to ignore it when they are not, so that the impressive list of references to it in the cases may be somewhat misleading; and there are those who have disagreed with many of its conclusions and even denounced the whole project."

Prosser & Keeton, *The Law of Torts*, 17 (5th ed. 1984 & Supp. 1988); see also Green, *The Torts Restatement*, 29 Ill.L.Rev. 582 (1935), and Milner, *Restatement: The Failure of a Legal Experiment*, 20 U.Pitt.L.Rev. 794 (1959).

Many courts have not concerned themselves with the veracity of the statements if the communications were intended to defeat the legal action granted to them by law. In *Pino v. Protection Maritime Ins. Co, supra*, there is no question that the insurance company's statements were based upon truth and not upon falsity. However, the court did not entertain any defense of truth. The court of appeal in *Pino, supra*, focused on the motive or intent of the defendant and did not consider the defense of truth. While the decision of *Pino* was grounded in the *Restatement (First) of Torts*, other courts have declined to apply the truth defense of § 772 of *Restatement (Second) of Torts*, where the communication was based on improper purposes. For example, in *Scussel v. Balter*, 386 So.2d 1227,

1228 (Fla. App. 1980), the court refused to apply § 772 under the circumstances; and in *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611, 623, 624 (Pa. Super. 1980), the court found that the defenses of § 772 are not absolute but must be considered in light of other policies.

The Ninth Circuit's restrictive opinion is in violation of the well established rule that seamen are wards of the court, *Arguelles v. U.S. Bulk Carriers*, 400 U.S. 351, 355 (1971), and is in complete derogation of the policies underlying the Seaman's Wage Act and its availability to foreign seamen. The Seaman's Wage Act has been in existence in some form since 1790. See discussion in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1982). One of the many essential purposes of the Act was to "secure the promptest possible payment of wages." *Id.*, at 573. However, this is not *the only* motivating reason for the application of the Seaman's Wage Act to foreign seamen. As was submitted to this Court seventy years ago in the case of *Strathearn S/S Co. v. Dillon*, 252 U.S. 348 (1920), the primary purpose of extending the Wage Act to foreign seaman was to encourage the survival of the American merchant marine by equalizing the costs between the American merchant marine and others. See Bickell, *Strathearn S/S Co. v. Dillon*, an unpublished opinion, 69 Har.L.Rev. 1177; and generally Forsyth, *The American Merchant Marine and His Industry* (1989).[7]

Strathearn S/S Co. v. Dillon, supra, involved a claim for wages by a British subject while on a British-flagged vessel in Florida. Particularly, the case involved application of the one-half wage provision of the Wage Act, now

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[7] Forsyth, Craig J, *The American Merchant Seaman and His Industry* (New York: Taylor & Francis New York, Inc. 1989).

46 U.S.C. § 10313(e). The United States filed an amicus brief in this matter because of strong national concerns that the applicability of the Wage Act to foreign flagged vessels be upheld.[8] There are several policies presented by the United States as amicus which bear strongly on the intended purpose of the Wage Act. Page 4 of the Amicus Brief of the U.S. reaffirms what Petitioners submitted to this Court earlier:

> "The purpose sought to be accomplished was to equalize on foreign vessels the burdens placed by American law, in its care for American seamen, upon the American merchant marine, by making such foreign vessel seeking American ports subject to regulations affecting American vessels."

As noted in the Amicus Brief, the passage of the Seaman's Wage Act was in response to strong national concern about the decline in the American Merchant Marine. See also *Angad v. M/V Fareast Trader*, 1989 A.M.C. 2721 (S.D. Tex. 1989). As was presented to the district court in this case, and as recognized by the Amicus Brief in *Strathearn S/S Co.*, the decline of the merchant marine was attributable to several factors. However, one specifically was focused on by the district court in this case and the United States as amicus: a higher cost of operation, due primarily to higher wage standards. Amicus Brief, at 5. The Congress considered lowering the wage standards of American seamen through passage of Act 23 Stat. 53, of June 26, 1884, but it failed. The Seaman's Wage Act of

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[8] This brief was filed by the United States through the Solicitor General Alex C. King in November 1919, Docket No. 373. It is not reproduced since this Court has this brief on record.

1915, now 46 U.S.C. § 10313, reverses this approach and instead seeks to raise the standards of foreign vessels to those found in America. Amicus Brief, at 6. The most important goal of the legislation was summed up as follows:

> "While the application of the act here contended for will benefit foreign seamen as well as American, this is essential in order to make effective such benefits for American seamen and to protect the American merchant marine. For if foreign ships manned by foreign crews could come in to American ports free from liability to respond to the demands of the sailors for wages, shippers and ship brokers would give preference to foreign charters, and the masters would discriminate against American seamen. Thus it would come about that instead of benefiting American men and American shipping, the act would be but another hindrance.
>
> Therefore, to make the act effective for the benefit of American seamen and the protection of American ships, it is provided that masters of foreign vessels, while completely at rest in our ports, and enjoying our hospitality and the protection of our laws, shall be under like liability with the master of American vessels to respond to the demands of their crews for one-half of their accrued wages." Amicus Brief, at 9-10.

Accordingly, national policy is strongly behind equal enforcement of the wage statute to foreigners and Americans alike. Any activity which would interfere with enforcement of these provisions or frustrate the basic policy behind the wage statute should not be tolerated, much less sanctioned, by the admiralty courts.

The Ninth Circuit opinion is contrary to the approach taken both by Congress and numerous courts in implementing other congressional acts and federal labor law. Numerous federal statutes likewise prohibit retaliatory or discriminatory conduct associated with various aspects of the employer-employee relationship.[9] Many of these don't apply in this case because of a broader policy not to apply federal labor law to foreign flagged vessels absent clear congressional intent. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), *McCulloch v. Sociedad Nacional Marineros de Honduras*, 372 U.S. 10 (1963). However, courts around the country have uniformly granted private causes of action because of the public policy against illegitimate interference with employee enforcement of their rights granted under federal law.

For example, in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981), the court of appeal answered the question of whether a Jones Act seaman whose at-will employment is terminated because he filed suit against his employer under the provisions of the Jones Act had a cause of action under the general maritime law. The answer was clearly in the affirmative:

> "The recognition of a cause of action in admiralty providing the seaman with relief from a discharge caused by his filing of a claim against the employer is particularly appropriate in light of the admiralty court's protective attitude towards seaman. . . . We conclude . . . that a discharge in retaliation for a seaman's exercise

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[9] National Labor Relations Act, 29 U.S.C. 158 (a)(3-4); Fair Labor Standards Act, 29 U.S.C. 215; Federal Employer's Liability Act, 45 U.S.C. 60; Federal Railroad Safety Act, 45 U.S.C. 441 (a); and Occupational Safety and Health Act of 1970, 29 U.S.C. 660 (c)(1).

> of his legal right to file a personal injury actions against the employer constitutes a maritime tort."

Similarly, in *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031, 1033 (9th Cir. 1970), the court of appeals in granting a cause of action for violation of the Railway Labor Act of 1926 stated:

> "In the absence of clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose."

See also, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967). *Wyandotte Transp. Co., supra*, and in *Ostrofe v. H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982), the court of appeals found that if the court failed to extend a private remedy under the penalty provisions of the Clayton Act it would guarantee retaliatory action, thus ultimately encouraging noncompliance with the act. Accordingly, the court found a private cause of action to exist.

Thus, the protections extended to the labor force has been interpreted broadly in favor of encouraging compliance with the enforcement provisions of those acts. For example, the United States Court of Appeals for the District of Columbia, in *John Hancock Mut. Life Ins. Co. v. National Labor Relations Board*, 191 F.2d 483, 485 (D.C. Cir. 1951), held that the anti-retaliatory provisions of the NLRA extends not only to current employees but to members of the workforce, in general: "in the absence of specific limitation, [the term employee] includes not only the existing employees of an employer but also, in a generic sense, members of the working class." The facts of the case reveal that the court found that the employer

had refused to hire an applicant for employment because of previous testimony before the National Labor Relations Board. Of course, in all of the above illustrations, the acts resulting in retaliation are presumed to be based on truthful allegations.

As shown above, motive has always been the central issue in determining whether retaliatory action has been taken. *NLRB v. Searle Auto Glass, Inc.*, 762 F.2d 769 (9th Cir. 1985). Numerous courts have held that discrimination or discharge of employees, regardless of their status, who have sought the benefits of the NLRA, whether through filing complaints thereunder or by giving testimony before the NLRB, is one of the most serious unfair labor practices. See, e.g., *NLRB v. Schill Steel Products*, 480 F.2d 586, 594 (5th Cir. 1973). When considering an action of retaliatory discharge or tortious interference several commentators have recognized that the critical element is "invariably that of justification." Holloway & Leech, *supra*, at 194. The focus is not on whether or not the alleged interference arises from truthful statements but whether they were utilized for an improper motive.

The federal labor law has long recognized the need for protective measures, sometimes provided by Congress – sometimes by the courts. In every case authorized by Congress to discourage retaliation, Congress determined that truth was not relevant; instead motive or justification, as found in *Pino v. Protection Maritime Ins.*, supra, was the factor focusing liability for interference. This Court, in its supervisory capacity over the admiralty, should not allow the Ninth Circuit's blind reliance on the Restatements to detrimentally impact the congressionally intended purpose of the Seaman's Wage Act. This was the same argument presented to this Court by the United

States as amicus curiae when it noted that the rights granted in the Act, and its intended purpose would be defeated if not allowed to apply to foreign seaman with equal force as Americans:

> "But such a plan would prove entirely abortive if the foreign seaman in our ports were unable to obtain sufficient money to carry him until he secured his next job and were compelled by his immediate necessities for food and lodging to remain with the foreign ship." Amicus Brief, at 12.

Similarly, the Wage Act is emasculated if foreign seamen are precluded from enforcing their rights against the vessel owner for fear of retaliatory action and blacklisting. Nothing but the fear of intervention by the U.S. courts will preclude unscrupulous shipowners from interfering with the future employability of these seaman. No seaman will sue under the Wage Act if he will never work again as a result thereof. The Seaman's Wage Act will be dormant and its policies and purposes unfulfilled.

This Court should grant certiorari to review the holding of the Ninth Circuit below in light of these cases, and to determine if, in fact, truth is an absolute defense to the tort of blacklisting.

B. The Narrow Interpretation of the Provisions of the Seaman's Wage Act and Failure to Assign Reasons for Reversal of the Award of Back Wages Due.

1. The Court of Appeals clearly erred when it failed to assign reasons for reversing the award of back wages.

The Ninth Circuit erred when it failed to assign any reasons whatsoever to the reversal of the trial court's

finding that $23,696 in back wages was due to the seamen. The district court found that there was $23,696.00 in back wages due the seamen, which included $15,019.20 in wages that were earned from January 20, 1990, until the date of final discharge of February 8, 1990. When the court of appeals discussed underpayment of wages, it seemingly found this finding was correct. However, when judgment was reversed and rendered by the court of appeals, the court of appeals reversed the award of back wages without any explanation whatsoever. Previously, another panel of the Ninth Circuit considered the amount of supersedeas bond for appeal noted that "the decision is far from clear" as to the amount of wages that had been paid or were due. The case was remanded to the district court for the limited purpose of resetting the bond and the district court was ordered to "determine whether the full amount of back wages (not including penalty wages or interest) has been tendered to the plaintiffs, or to any of them." Two weeks prior to the hearing on remand to set the supersedeas bond and determine the amount of wages due, the Defendants deposited $15,019.20 into the registry of the court as past due wages, to terminate the accrual of penalty wages in accordance with the Ninth Circuit opinion. At the hearing, Defendants contended there had been an overpayment of wages and Plaintiffs' contended wages were still due and owing. The district court made no determination as the parties stipulated to the amount of the supersedeas bond for appeal.

This Court clearly set forth in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), that the standard of review utilized by higher courts in determining the propriety of a district court's judgment is that the factual finding must not be "clearly erroneous," citing Federal Rules of Civil

Procedure, Rule 52(A). A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573. The court of appeals clearly erred in its factual findings as it did in its legal analysis. Most disappointing, the court of appeals apparently feels that double bookkeeping in harbors of the United States is proper. The court noted, "It is also unclear what wrongful conduct the shipowners engaged in while in a United States port" in denying Petitioners' statutory claims for double wages. Discussing the maritime torts, the court concluded that maintaining double books and subjecting seamen to duress, coercion, and intimidation was not outrageous conduct that far exceeds the bounds of decency, but was really nothing more than "petty oppressions, or other trivialities."

2. The Court of Appeals narrowly interpreted the Seaman's Wage Act to defeat the cause of action for penalty wages thereunder.

The Seaman's Wage Act contains both a half wage statute (Subsection (e)) and a full wage statute (Subsection (f)). The half wage statute allows a seaman to demand one-half of his wages at any U.S. port and the failure of the shipowner to pay such wages results in the seaman being released from the shipping articles and entitled to full wages under Subsection (f), the full wage statute, with a consequence of double wages being due under Subsection (g). Also, the full wage statute Subsection (f) requires the payment of full wages "at the end of a voyage" and requires payment of the balance of the

wages "within 24 hours after the cargo has been discharged or within 4 days after the seaman has been discharged, whichever is earlier."

The trial court found that the seamen made a demand for one-half wages on each of the eight (8) separate voyages of the M/V Pine Forest to the United States by "plaintiffs' execution of the shipping articles and their signing the wage receipts for the wages set forth in the shipping articles constituted a legally sufficient demand for payment of wages." The court specifically noted:

> "The application of 46 U.S.C. § 10313(e) was triggered when plaintiffs' demand for payment of past wages earned and unpaid at each port at which the vessel discharged ballast was refused."

The Court had noted that the Defendants "never intended to comply with the shipping articles and ITF wage scale" and that "the seamen were in a very vulnerable position and were easily intimidated. The court expressly found the Defendants' requirement that Plaintiffs sign two sets of conflicting wage receipts "was repudiation of their contractual obligations to pay plaintiffs the wages set forth in the shipping articles and discharged by operation of law, plaintiffs duty to make a formal demand for wages."

The Ninth Circuit noted the applicability of the half wage statute to foreign vessels stating:

> "Each time a foreign vessel takes on or discharges cargo in a United States port, the foreign crew may invoke the Act's half wage provision. If the master refuses to pay, the men may invoke the full wage provision. Foreign vessels cannot avoid the Act simply by insuring that they never complete a voyage in a United States port."

However, the Ninth Circuit opinion expressly allows foreign vessels to avoid the Act by duress, intimidation, and coercion – acts that the district court expressly found to exist in the instant case. The Ninth Circuit found that the seamen's demand for half wages was ineffective and failed to "notify the ship's master of the crew's claims", even though the shipowner knew the exact amount of wages due by virtue of the required fake wage receipts that were not honored. The Ninth Circuit was wrong in ignoring the factual findings of the district court and substituting its own definition of "demand".

The Ninth Circuit likewise redefined "voyage" and "cargo" in interpreting the full wage statute in the most favorable position to the shipowner, and not the seaman whom it was enacted to protect. The Ninth Circuit redefined "end of voyage" for the purposes of the full wage statute stating:

> "A seaman's voyage ends when his commitment to work aboard the ship is terminated, either by completion of his contract or by premature discharge."

While this definition may certainly be partially true, the Ninth Circuit attempts to completely write out of the jurisprudence the established rule that a voyage is a complete one way trip, and in some circumstances a round trip. In litigation involving the Limitation of Liability Act, 46 U.S.C. § 183, et seq., a voyage is normally held to be a one way trip for the unit for claims as well as values to be surrendered. *La Bourgogne*, 210 U.S. 95 (1908); *The Black Eagle and Concordia*, 87 F.2d 891 (1937). It is anomalous to only require a shipowner to post pending freight from the last one way trip to minimize its financial exposure in seeking the protection of 46 U.S.C. § 183 and to impose an entirely different definition of a voyage to

prohibit a seaman from obtaining the protection of the Seaman's Wage Act. In so doing, the Ninth Circuit has created a great conflict with the previous holdings of this Court and the circuit courts of appeals.

A conflict further exists as to whether there is any necessity of a voyage for the application of 46 U.S.C. § 10313(f). In *Chung Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir. 1983), *cert. denied* 474 U.S. 1177 (1986) (White, J., dissenting from denial of certiorari). The Ninth Circuit held that there was a strict voyage requirement: "As we read *Griffin* and *Chung*, however, neither ignores the voyage requirement." The statement is unconvincing in light of the unambiguous language of the Eleventh Circuit:

> "Although the statute does call for payments to be made at a certain time, depending on the kind of voyage, nothing in the statute mandates that the vessel commence and complete a voyage in which the seamen participated before the seaman is entitled to penalty wages. *If congress had intended to impose a voyage requirement, it could have chosen clearer language than it did. The purpose of the statute would hardly be furthered by our imposing such a requirement, and we decline to do so.*" [Emphasis added]

This Court as well as other courts has not given any consideration to the voyage as an element of recovery. For example, in *Pacific Mail S/S Co. v. Schmidt*, 241 U.S. 245 (1916), the seaman at the end of a foreign voyage received full payment of his wages earned on the voyage of September 24, 1913, the last day of the voyage. Seaman Schmidt stayed on the vessel while it was in port and worked until he was discharged on October 1, 1913. Schmidt demanded his wages from September 24 until October 1 but was denied payment. This Court did not

question the right of the seamen to wages or an action under the Wage Act for these wages. The sole issue on appeal was the award of penalties during the pendency of the appeal. See also, *Griffin v. Oceanic Contractors, supra*; cf., *Burie v. Overseas Navigation Corp.*, 205 F.Supp 182 (S.D.N.Y. 1962) (articles of employment can terminate in the middle of a voyage).

The Ninth Circuit erred when it determined that the definition of cargo did not include ballast for the purpose of the wage statute. The panel admits that the language of the statute is "ambiguous at best" and that conflicting jurisprudence has interpreted the word "cargo" in different ways. The definition of "cargo" is of exceptional importance and that the impact of this particular part of the decision is even now being felt around the country as the latest and only interpretation in the national jurisprudence of this aspect of the statute. Under the panel's rule, a foreign ship, such as the M/V Pine Forest, doing 100% of its business in the United States is immune from the provisions of the statute if it only takes cargo from the United States. This effectively nullifies the provisions of the statute and its underlying policy which is to make the law equally applicable to American shipowners and foreign shipowners who enter American ports. A. Bickell, *Strathearn S.S. Co. v. Dillon: An Unpublished Opinion*, 69 Har.L.Rev. 1177 (Justice Brandeis' unpublished opinion in *Strathearn v. Dillon*); see also Amicus Brief of the United States in *Strathearn SS Co. v. Dillon*.[10] The panel's distinction of ballast with value being cargo, but ballast without value not being cargo does not serve the legitimate goals of the statute. It is a mere fluke of technology that ballast

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[10] See note 8 *supra*.

has ceased to be valuable. The idea of pumping seawater into the cargo holds of a ship in 1872 when the word ballast was removed from the statute would have been insane. The later development, whose use facilitated modern ships, is now being used to obviate the statute. By allowing this development of technology to interfere with the application of the statute, the Ninth Circuit is effectively allowing time and technology to become a third house of congress capable of amending laws by a mere twist of fate.

Even if the Ninth Circuit's definition of cargo is correct, the wage statute was applicable on the facts before the court. The M/V Pine Forest did in fact discharge cargo in a foreign port, and that coupled with non-payment of wages in a U.S. port renders the full wage statute applicable. There is no language whatsoever in the wage statute that requires either the cargo or the seamen to be discharged in a U.S. port. The statute requires that the wrongful conduct, that is the non-payment of wages, occur in a U.S. port while the foreign seaman is on the vessel. These facts occurred and the statute is applicable.

This adverse opinion of the Ninth Circuit Court of Appeals impacts the very application of the wage statute throughout the United States and is in conflict with decisions of other circuits and this Court. This Court should grant Petitioners' writ of certiorari in light of the existing conflict and the previous liberal interpretation given the wage statute, 46 U.S.C. § 10313.

CONCLUSION

This Honorable Court should grant writs to review the decision of the Ninth Circuit Court of Appeals opinion below in accordance with the Questions Presented herein.

Dated this 5th day of February, 1993.

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v.

M/V SOUTHERN ASTER; Southern Aster Navigation, S.A., Defendants-Appellees.

Edwin A. JOSE, Plaintiff,

and

Perfecto C. Lim; Buen B. Esclamado; Crescencio I. Napao; Tomas N. Rosles Je; Hermiles S. Pinoon, Applicants in intervention-Appellants,

v.

M/V FIR GROVE; Delica Shipping, S.A.; Inui Steamship Co., Ltd. Defendants-Appellees.

Nelson R. RABY; Teofanis F. Roz; Apolonio H. Torreliza; Associated Marine Officers & Seaman's Union of the Philippines; S. Galua; Boifacio C. Tabada, et al.; Leo C. Ajero; Teodulo R. Rabie; Marcelo G. Suarez; Miguelito A. Cabales, et al., Plaintiffs-Appellees,

v.

M/V PINE FOREST; Delica Shipping, S.A.; Inui Steamship Co., Ltd., Defendants-Appellants.

Nos. 90-35485, 90-35486, 90-35706, 90-35618, 90-35879, 91-35375.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 17, 1992.

Decided Oct. 14, 1992.

Richard J. Dodson, Baton Rouge, La., John W. Buehler, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Seattle, Wash., Robert M. Weinberg, Virginia A. Seitz, John West, Bredhoff & Kaiser, Jeremiah H. Collins, Susan D. Carle, Washington, D.C., I. Franklin Hunsaker, for plaintiffs.

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Appeal from the United States District Court for the District of Oregon.

Appeal from United States District Court for the Western District of Washington.

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

EUGENE A. WRIGHT, Senior Circuit Judge.

These consolidated cases test the bounds of the Seamen's Wage Act, 46 U.S.C. § 10313 (1988). The Wage Act protects seafarers from the efforts of unscrupulous shipowners to take advantage of their superior economic position to withhold payment of promised wages. Each case requires us to resolve this question: Do the Wage

Act's protections extend to foreign crews discharged from foreign ships in foreign ports? Although Congress likely could have extended the Wage Act this far, we conclude that it did not. The structure, history and, more important, the plain language of the Act all point to this result. Congress must speak clearly to overcome the strong presumption against extraterritorial application of United States law, and this it has not done.

I

Seamen from three Japanese log-carrying ships (the PINE FOREST, FIR GROVE and SOUTHERN ASTER) insist that they were systematically underpaid. The shipowners concede that they paid less than union wages, but say the crew agreed to the lower wages and further agreed to help the shipowners mislead union inspectors intent on uncovering such underpayments.

Underlying the men's claims is an ongoing dispute between shipowners and the International Transport Workers Federation, an umbrella labor organization of affiliated seafarers' unions. The unions seek to maintain worldwide wage rates that far exceed what seafarers from undeveloped countries demand.

The shipowners cannot merely ignore the unions, however, for if the owners fail to pay the union rate, the unions will sometimes interfere with the loading or unloading of the ships. To avoid this, the shipowners must demonstrate compliance with union rules and, in return, the unions award the ships protection in the form of a "Blue Certificate". By showing a Blue Certificate,

ships can forestall union hostility while in port. Shipowners have devised a scheme to obtain Blue Certificates without paying union wages. They keep two sets of books on each ship. One set records the actual wages paid and the other records union scale wages. Seamen memorize the union scale and the ships' masters instruct the crew to lie to union inspectors, telling them that the crew are receiving full union wages.

In the ship's articles, only the union wages are recorded. When the men are paid, they sign two receipts: one records the actual wages and the other shows union wages. This so-called "double-bookkeeping" scheme was used in an effort to deceive the unions on all three ships in this consolidated appeal.

A. The PINE FOREST

The PINE FOREST flew the flag of the Republic of Vanuatu,[1] was operated by a Japanese firm, and was owned by a Panamanian corporation which in turn was beneficially owned by Japanese citizens and companies. It carries logs from the United States to Japan; from Japan to the United States it carries only seawater as ballast.

The PINE FOREST entered service in March 1989 with a crew of nineteen Filipino seafarers. Two others joined the ship later. The men signed 12-month contracts

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[1] Apparently, the Republic of Vanuatu is to shipowners what Delaware is to coporate executives. Vanuatu is well-known for its unintrusive admiralty law. Despite its small size, it has about 400 registered merchant vessels. Paul K. Chapman, *Trouble on Board* 99 (1992).

in the Philippines, were told what they would be paid, and joined the ship in Japan. Each man signed the PINE FOREST's shipping articles, which recited that it abided by the union collective bargaining agreement specifying wages that far exceeded what they had been promised in the Philippines. Each was told, however, that he would in fact receive the lower wages originally promised and that he would be expected to help the shipowners deceive the union.

From March 1989 until the end of January 1990, the PINE FOREST sailed back and forth between Japan and the United States, completing eight trips. At each month end, the crew members received their wages and signed receipts for their actual wages and the higher union wages.

The scheme fell apart while the PINE FOREST was in port in Tacoma. On January 30, 1990, eleven of the crew members filed a complaint demanding full union wages. Their attorneys had the vessel arrested. Shortly thereafter, two other crew members signed the complaint. The union later added the remaining eight seafarers to the complaint, but these eight never signed or verified it.

The thirteen who signed the complaint left the PINE FOREST on February 8, after their replacements arrived. In their seamen's books, which they must take to each new vessel, the master recorded the reason for discharge. "Requested repatriation upon filing wages claim to arrest vessel." The other eight crew members remained aboard the PINE FOREST, completed their year of service, and left the vessel in Japan.

On February 13, the shipowners tendered $267,586 as the amount due the thirteen crew members who had left the ship. The seafarers divided and accepted this payment but later contended it was insufficient. The court set bond at $19,000,000, which the shipowners posted to release the vessel.

At trial, the plaintiffs succeeded on both statutory and maritime tort claims. The court awarded the seafarers $32,657,536, divided as follows:

Thirteen plaintiffs discharged in United States:

1.	Back Wages	23,696
2.	Statutory Penalties	4,191,671
3.	Loss of Future Income	6,800,470
4.	Emotional Distress	1,300,000
5.	Punitive Damages	13,000,000

Eight plaintiffs discharged overseas:

1.	Back Wages	142,236
2.	Statutory Penalties	2,799,463
3.	Loss of Future Income	0
4.	Emotional Distress	400,000
5.	Punitive Damages	4,000,000

The court also awarded attorneys' fees, relying on *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962).

B. The SOUTHERN ASTER

The SOUTHERN ASTER, like the PINE FOREST, was a Japanese-owned log-carrier that transported United States logs to Japan. The crew was Korean rather than Filipino, and were represented by the Korean affiliate of the International Transport Workers Federation.

The crew joined the ship in Japan in March 1988, worked for about a year, then disembarked in Japan. During that year, the SOUTHERN ASTER made eight trips to the United States. It operated the same double-bookkeeping scheme as the PINE FOREST, paying the crew a lower wage than the union rate contained in the ship's articles.

On February 21, 1990, plaintiffs' attorneys had the SOUTHERN ASTER arrested in Coos Bay, Oregon, after filing a complaint for back wages on behalf of the absent crew. The district court set bond, which the shipowners posted to release the vessel.

The district court dismissed the case, granting the shipowners' 12(b)(6) motion on the statutory claims and dismissing the remaining claims on the ground of *forum non conveniens*. The court was not persuaded that the statute applied to foreign seafarers discharged in foreign ports from foreign-owned and flagged vessels. The shipowners agreed to submit to the jurisdiction of a Korean court as a condition of dismissal.

C. The FIR GROVE

The FIR GROVE was a sister ship of the PINE FOREST. It too employed a Filipino crew, flew the Vanuatu flag, and was beneficially owned by the Japanese.

In January 1989, the crew joined the FIR GROVE in Japan. They had been recruited in the Philippines and had agreed to a 12-month term of service. Over the next year, the FIR GROVE completed six trips between Japan and the West Coast, carrying logs to Japan and carrying ballast on the return trip. On these trips, the shipowners maintained the same double-bookkeeping scheme as on the PINE FOREST.

On the seventh trip, twelve crew members had the ship arrested in Coos Bay after filing a complaint for back wages, totalling about $300,000. Two other crew members later joined the complaint. The shipowners paid the back wages under a reservation of rights, and posted a bond to release the FIR GROVE. These fourteen seamen were discharged in Oregon.

Counsel moved for leave to file an amended complaint adding five more crew members who had not verified or signed the complaint and who had not been discharged in Coos Bay. These five stayed on the vessel, completed their year's obligation, and left the ship in Japan.

The court denied the motion, but allowed the five to apply for intervention. They did but the court refused their application, reasoning that their statutory claims were barred because they had been discharged in a foreign port. These five appeal the judgment denying their motion to intervene.

II

The Seamen's Wage Act, 46 U.S.C. § 10313, protects seafarers by ensuring they receive timely payment of

wages. The Wage Act's full wage provision requires prompt payment of wages at the completion of a voyage:

> At the end of a voyage, the master shall pay each seafarer the balance of wages due the seafarer within 24 hours after the cargo has been discharged or within 4 days after the seafarer is discharged, whichever is earlier. . . . When payment is not [timely] made . . . without sufficient cause, the master or owner shall pay to the seafarer 2 days' wages for each day payment is delayed.

46 U.S.C. §§ 10313(f), (g). Necessary to recovery under this provision is a showing that (1) the voyage ended, (2) either the cargo or the seafarer has been discharged, and (3) payment was withheld without sufficient cause.

The Wage Act's half-wage provision also covers partial payments each time a ship stops in port to load or unload cargo:

> After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. . . . If a master [fails to pay], the seaman is released from the agreement and is entitled to payment of all wages earned.

46 U.S.C. § 10313(e). The seaman must show that the master refused the man's demand for half-wages. Once the master refuses to pay, full wages become due, and if not paid, the seafarer may be entitled to double wages for each day's delay. *In re Williams*, 139 F.2d 262, 263 (4th Cir.1943).

The Wage Act also has an important jurisdictional provision, extending the Act's protections to seafarers on foreign ships when in a United States harbor:

> This section applies to a seafarer on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. § 10313(i).

A. Underpayment

The seafarers bear the burden of showing that the shipowners paid less than the full amount of wages due. The shipowners half-heartedly contend that the seafarers have no claim because they received the wages promised by the manning agency. The owners suggest that the higher rate shown in the shipping articles does not govern the seafarers' wages, because the men knew they would never be paid that amount.

It is well-established, however, that the shipping articles govern the contract of employment between the seamen and the master, and parol evidence to vary the terms of the articles is permitted only to show that the articles were fraudulently changed by the seafarers. *See* Martin J. Norris, *The Law of Seamen* §§ 6:1, 6:31 (4th ed.1985); *Northwestern S.S. Co. v. Turtle,* 162 F. 256, 258 (9th Cir.1908). In short, once the shipowners executed the shipping articles in furtherance of the double-bookkeeping scheme, they were bound to pay the rate recorded in the articles rather than the lower rate promised before the voyage.

B. Foreign seafarers discharged in United States ports

The Wage Act's jurisdictional provision makes clear that foreign seafarers discharged in an American port may invoke the Act's protections. The issue for these men is not whether they are entitled to seek back wages under the Act, but rather when the Act's protections were triggered and, based on that determination, what if any statutory penalties are due.

The PINE FOREST court awarded the 13 seafarers discharged in the United States over $4,000,000 in statutory penalty wages, finding that the Wage Act's protections were triggered each time it reached port. It reasoned that each leg of the trip was a voyage and the seawater ballast qualified as cargo.

1. Ballast as cargo

To trigger the protections of the Wage Act's full wage provision, the seafarers must show they were not timely paid at the end of their voyage. Timely payment under the statute means payment within 24 hours of discharging the ship's cargo or within four days of the seafarer's discharge, whichever is earlier. The definition of "cargo" under the statute is important for, assuming each trip from Japan to the United States constituted a voyage, if the seawater carried as ballast on those trips qualifies as "cargo," penalties started accruing at the end of each trip.

The Act leaves the term "cargo" undefined. No court has answered the question whether seawater ballast is

cargo under the Act. Precedent from other contexts, common definitions and common sense, however, suggest that seawater ballast is not cargo.

Black's defines *ballast* as "[t]hat which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing." *Black's Law Dictionary* 181 (4th ed. 1951). *Cargo*, on the other hand, is

> [t]he load or lading of a vessel; the goods, merchandise, or whatever is conveyed in a ship or other merchant vessel. While "cargo" is primarily the load of the ship, it may have a varying meaning. The term may be applied in such a sense as to include passengers, as well as freight, but in a technical sense it designates goods only.

Id. at 268 (citations omitted). Non-law dictionaries similarly distinguish the two, defining ballast as "[a]ny heavy material placed in the hold of a ship . . . to enhance stability", and cargo as "[t]he freight carried by a ship. . . . " *See, e.g., American Heritage Dictionary* 102, 204 (1976). Freight is defined as "[g]oods carried by a vessel or vehicle; lading." *Id.* at 525.

Courts have also treated the two as distinct. Many have noted, for example, that ships carrying ballast are "without cargo". *See The Pedro*, 175 U.S. 354, 381, 20 S.Ct., 138, 148, 44 L.Ed. 195 (1899), *rev'd on other grounds, The Buena Ventura v. United States*, 175 U.S. 384, 20 S.Ct. 148, 44 L.Ed 206 (1899); *United States v. Alvarez-Mena*, 765 F.2d 1259; 1261 (5th Cir. 1985); *Pacific Far East Line v. United States*, 394 F.2d 990, 994, 184 Ct.Cl. 169 (1968); *Oliver J. Olsen & Co. v. Luckenbach S.S. Co.*, 279 F.2d 662, 672 (9th Cir.) *cert. denied*, 364 U.S. 881, 81 S.Ct. 171, 5 L.Ed.2d 103

(1960); *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F.Supp. 73, 73 (S.D.N.Y.1986), *rev'd on other grounds*, 830 F.2d 421 (2d Cir.1987), *rev'd*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *McGhee v. United States*, 75 F.Supp. 76, 78 (S.D.N.Y.), *modified*, 165 F.2d 287 (2d Cir.1947).

A very few cases have considered ballast as cargo, but in those instances the ballast was something of value. For example, in *Lo Bue v. United States*, 75 F.Supp. 154, 154 (E.D.N.Y.1947), the court referred to a "cargo" of slag ballast. *See also New York Trap Rock Corp. v. Christie Scow Corp.*, 165 F.2d 314, 316 (2d Cir.1948) (unloading of "cargo" of ballast to a second ship for further transport). In none of these cases was the ballast simply worthless seawater.

An earlier version of the full wage provision provided for payment after the discharge of "cargo or ballast", but Congress later deleted the reference to ballast. *Compare* Seaman's Wage Act, ch. 29, § 6, 1 Stat. 133 (1790) *with* Shipping Commissioners' Act of 1872, ch. 322, § 35, 17 Stat. 269 (1872). Congressional intent underlying the revision is at best ambiguous. The reference to ballast may have been viewed as redundant. Yet coincident with the change, Congress added the discharge of the seafarer as a triggering event. In light of this added protection, it may have decided ballast discharge was no longer necessary as a triggering event.

We conclude that worthless seawater carried as ballast does not constitute cargo as envisioned by the Wage Act. Cargo is freight or goods that have some value. Even if each leg of the trip could be considered a separate

voyage, the Act's protections were not triggered when the log-carriers dumped their load of seawater on arrival in an American port.

2. Each trip as a voyage

Like "cargo", "voyage" is not defined in the Wage Act. The PINE FOREST court defined each leg of the trip as a voyage. We conclude that such a definition conflicts with the structure and language of the Act.

The Act contains both full and half wage provisions. The latter is triggered at every port in which the ship takes on or discharges cargo. We doubt Congress could have intended the broad definition of a voyage adopted by the PINE FOREST court. Defining a voyage as each leg of a trip renders the half wage provision meaningless, for under that definition the full wage provision could be invoked any time the half wage provision could apply.

The seamen insist, though, that courts have read the "end of voyage" requirement out of the statute. They rely on several recent decisions in which courts have held that the full wage provision applied though the ship never left port. For example, in *Griffin v. Oceanic Contractors*, 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982), Griffin suffered an injury shortly after joining the vessel and before it sailed. Although the Court did not expressly consider whether he met the voyage requirement, it granted him relief under the full wage provision. *Id.* at 577, 102 S.Ct. at 3253.

In *Chung, Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir.1985), *cert. denied*, 475 U.S. 1147, 106 S.Ct.

1802, 90 L.Ed.2d 346 (1986), the court explicitly considered the issue. Like *Griffin*, the *Chung* crew were discharged after spending time on a ship that never left port. The court held that the voyage requirement did not preclude these men from invoking the full wage provision. *Id.* at 1051.

As we read *Griffin* and *Chung*, however, neither ignores the voyage requirement. Instead, they define voyage to further the Wage Act's protective purpose. A seaman's voyage ends when his commitment to work aboard the ship is terminated, either by completion of his contract or by premature discharge. *See, e.g., Mavromatis v. United Greek Shipowners Corp.*, 179 F.2d 310, 318-19 (1st Cir.1949); *The Cubadist*, 252 F. 658, 660, 662-63 (S.D. Ala. 1918), *aff'd*, 256 F. 203 (5th Cir.), *cert. denied*, 249 U.S. 618, 39 S.Ct. 392, 63 L.Ed. 804 (1919). Under this definition the *Griffin* and *Chung* seafarers had completed their voyages when they were discharged, even though the ships never left port.

Applying this definition, the PINE FOREST seafarers were not entitled to full wages each time the ship stopped in the United States or Japan. Rather, full wages became due four days after they were discharged following the filing of the complaint. Although they had not completed their contractual obligations, their voyages terminated when they were discharged.

C. Foreign seafarers discharged in foreign ports.

We start with the well-established principle that, absent a clearly expressed intent to the contrary, United

States statutes apply only within the territorial jurisdiction of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). "We assume that Congress legislates against the backdrop of that presumption against extraterritoriality." *EEOC v. Arabian Am. Oil Co.*, ___U.S. ___, ___, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991). Because we find no clearly expressed intent to contradict this presumption, logic dictates that the full wage provision should not apply to foreign seafarers discharged from foreign ships in foreign ports.

This result is consistent with the plain language of the Wage Act, which is the clearer evidence of the Act's jurisdictional limits. The Act is part of Chapter 103 of Title 46, which notes that "[u]nless otherwise provided, this chapter does not apply to a foreign vessel." 46 U.S.C. § 10301(c). Against this background, the Act makes an exception for foreign vessels in American ports: "This section applies to a seafarer on a foreign vessel when in a harbor of the United States." *Id.* § 10313(i).

Nevertheless, the seafarers contend that crew members discharged overseas may recover under the Wage Act. They suggest that limiting the Act to foreign ships in United States ports thwarts one of the Act's underlying purposes. In their view, the jurisdiction limiting clause cannot really mean what it says. Alternatively, they insist that if some conduct facilitating the later withholding of wages occurred in an American port, the jurisdiction requirement is met.

They find some support in the case law. We have never decided the issue, and there is directly conflicting

authority among the districts in this circuit. In *Galon v. M/V Hira II*, 1990 A.M.C. 342, 1989 WL 211484 (W.D.Wash.1989), the court ruled without further analysis that "the statute does not require discharge in a United States port." *Id.* at 343. Shortly thereafter, the court in *Mateo v. M/S Kiso*, No. C-902357-DLJ ___ F.Supp. ___ (N.D.Cal.1991), held to the contrary, finding discharge in a United States port a prerequisite to applying the statute.

Confusion on this issue is not limited to this circuit's district courts. Some other courts have been willing to extend the Act to foreigners discharged in foreign ports. In *Ventiadis v. C.J. Thibodeaux & Co.*, 295 F.Supp. 135 (S.D.Tex.1968), the court held that "to limit [the Act] only to instances in which the seafarer is discharged in an American port would be to unreasonably restrict its effect." *Id.* at 138; *see also Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312, 314 (4th Cir. 1978) (extraterritorial discharge does not preclude application of the Act).

Other courts have followed the view expressed in dictum by Judge Friendly in *Monteiro v. Sociedad Maritima San Nicolas, S.A.*, 280 F.2d 568 (2d Cir.), *cert. denied*, 364 U.S. 915, 81 S.Ct. 272, 5 L.Ed.2d 228 (1960). Judge Friendly reasoned that "[t]he natural reading is rather that a seafarer on a foreign vessel obtains his right once the specified facts occur while the vessel is in a harbor of the United States. . . . " *Id.* at 574; *see also Cubeiro v. Sun Seaway Enters.*, 539 F.Supp. 1175, 1177 (S.D.N.Y.1982) ("[I]t is now well settled that a foreign seafarer, sailing on board a foreign-flag vessel, may file a [wage] claim in a United States court . . . if he was discharged from the vessel in a United States port. . . . However, it is equally

clear that for the statute to apply, the discharge must have taken place in a United States port."); *Barcelona v. Sea Victory Maritime,* 1992 A.M.C. 369, 372, 1991 WL 323803 (E.D.La.1991) (discharge must be in United States port); *Angad v. M/V Fareast Trader,* 1989 A.M.C. 2721, 2728, 1989 WL 201605 (S.D.Tex.1989) (wages can accrue anywhere, but withholding of payment must be in United States port).

The seafarers argue that if this court adopts Judge Friendly's view, it will confound one of the Act's underlying purposes. Congress was primarily concerned with protecting seafarers when it enacted these provisions. *Griffin,* 458 U.S. at 572, 102 S.Ct. at 3250. But Congress also sought to enhance the competitiveness of American shippers. It worried that subjecting only United States flag vessels to the wage provisions would put United States shipping at a competitive disadvantage. To level the playing field, it extended the Act to foreign vessels. 50 Cong. Rec. 55748-49 (Oct. 22, 1913).

Had Congress wanted to include all foreign vessels, however, it could have done so expressly. The language of the Wage Act is clear. It applies only to foreign vessels in United States ports. To let one of the Act's underlying purposes trump the statute's plain language would violate a basic tenet of statutory construction. *Cf. Commissioner v. Brown,* 380 U.S. 563, 571, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965) (purpose can override plain language only in an exceptional case).

But the seafarers also contend that the final withholding of wages was part of an ongoing scheme by the

shipowners, during the entire course of a voyage. Conduct integral to the scheme occurred while the ships were in United States harbors, say the seafarers, thus satisfying the Act's jurisdictional requirement.

Under this theory, a single pause at a United States port during the course of a three-year voyage would trigger the protections of the Wage Act. Such an expansive reading contradicts the Act's plain language. Nor is such a broad reading necessary to further the Act's purpose of equalizing shipping costs between foreign and United States vessels. Each time a foreign vessel takes on or discharges cargo in a United States port, the foreign crew may invoke the Act's half wage provision. If the master refuses to pay, the men may invoke the full wage provision. Foreign vessels cannot avoid the Act simply by ensuring that they never complete a voyage in a United States port.

It is also unclear what wrongful conduct the shipowners engaged in while in a United States port. The Act imposes harsh penalties but only for specific, well-defined conduct: the wrongful withholding of wages. Until that occurs, the Act's protections are unavailable. For those seamen discharged overseas, that prohibited conduct did not occur in a United States port.

D. Demand for half wages

The seafarers insist that even if they cannot obtain relief under the full wage provision, they can invoke section 10313(e), the half wage provision. This section allows crew members to claim half their accrued wages

when they are in a United States port loading or unloading cargo. The difficult issue of jurisdiction over foreign crews in foreign ports does not arise here, because each of the three ships loaded cargo in United States ports.

The key to the seamen's claim is whether they made an effective demand for half wages, as the Act requires. They insist they did, by executing wage receipts. They would have us believe that each time they signed a false receipt acknowledging payment of union scale wages, they were in fact demanding payment at that rate.

But for a demand to be effective, it must plainly and unequivocally request payment. "The demand must be plainly made so that the master will know exactly what is demanded of him, and since if he refuses the payment of the half wages, all of the wages then become due, it becomes obvious that clarity in the making of the demand is essential." Martin J. Norris, *The Law of Seamen* § 17:33 (4th ed. 1985); *see also In re Ivertsen*, 237 F. 498, 501 (N.D.Cal.1916).

Signing wage receipts as part of the double-bookkeeping scheme falls far short of an effective demand, for it fails to notify the ships' masters of the crews' claims. It would more easily have been interpreted as acceptance of the double-bookkeeping scheme rather than a demand for higher wages.

The seamen virtually admit this, saying that had they made their demands explicit, they would have been terminated. To allow such a hidden demand to satisfy the demand requirement would effectively eliminate it.

E. Summary of statutory claims

1. The PINE FOREST

The PINE FOREST crew discharged in the United States are entitled to back pay at the full union scale described in the ship's articles. The shipowners paid this amount when they tendered $267,586. The court erred in assessing penalties based on the mistaken conclusion that each trip was a voyage and that ballast was cargo.

The PINE FOREST crew discharged overseas are not covered by the Wage Act's full wage provision and did not make an effective demand for half wages. The court erred in awarding them back wages and statutory penalties.

2. The SOUTHERN ASTER

All the seamen were discharged overseas. The court did not err when it dismissed their statutory claims, nor did it abuse its discretion when it dismissed their tort claims on the grounds of *forum non conveniens.*

3. The FIR GROVE

The five FIR GROVE seamen seeking intervention were all discharged overseas. The court properly denied intervention.

III

Besides awarding back wages and statutory penalties, the PINE FOREST court also awarded substantial

tort damages. The court granted the crew $8.5 million in compensatory damages and punitive damages totalling $17 million. Yet neither the court's findings nor the evidence underlying them supports any of the tort theories on which the award is based.

A. Fraud

As a court sitting in admiralty, we look to the common law in considering maritime torts. *Guidry v. Durkin*, 834 F.2d 1465, 1470 (9th Cir.1987). We turn then to Washington's definition of fraud and its nine elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) an intent that it be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) reliance on its truth; (8) the right to rely thereon; and (9) consequent and proximate injury. *Markov v. ABC Transfer & Storage Co.*, 76 Wash.2d 388, 457 P.2d 535, 539 (1969). Each element is essential; if any is missing, the entire claim fails. *Id.*

The seafarers suggest that there were several misrepresentations that support a finding of fraud: (1) the shipowners planned to lie to union inspectors about the wage rates; (2) the manning agency told the seafarers they would receive a wage close to the union rate; and (3) the shipowners deliberately misled the seafarers about their rights to receive the union wage.

The shipowners admit an intent to deceive the union. This amounts to an intended misrepresentation to the seamen, say the crew, because of their relationship with the union. The union represented them. Under well-

established principles of agency law, an attempt to deceive an agent ordinarily constitutes an attempt to deceive the principal. Restatement (Second) of Agency § 315 (1957). Yet if the principal knows the true facts, the attempted deception may not be imputed to the principal. These seamen not only knew the facts but had agreed to help the shipowners to carry out the deception by lying to union inspectors. To call this a misrepresentation to the seafarers would stand agency law on its head.

The seamen argue, however, that even though they were a party to the misrepresentation, it nevertheless deprived them of one of the essential benefits of union representation. By negotiating a deal behind the back of the union, the owners undercut the union's role as the seamen's representative. Maybe so, but it is not fraud on the seafarers.

The men also insist that the manning agency misrepresented that they would be paid a wage that approximated the union wage. The court's express findings refute this. It found that the shipping articles "contained a significantly higher pay scale than the oral representations made to plaintiffs by [the manning agency]." Ample testimony by the seafarers supports this finding.

Finally, the seafarers say that the shipowners' failure to tell them that they were entitled to higher wages was a misrepresentation. The court's findings do not support this theory, nor are we willing to hold that this was a representation, let alone a misrepresentation.

The failure to show a misrepresentation is alone enough to undermine the seamen's claim of fraud, but they also failed to show either reliance or the shipowners'

intent to induce reliance on any alleged misrepresentations. Accordingly, we conclude that there was no fraud.

B. Outrage

The claims of intentional infliction of emotional distress are based both on the notations made in the seamen's books and their participation in the double-bookkeeping scheme.

To prove intentional infliction of emotional distress, the seafarers must show that: (1) the conduct complained of was extreme and outrageous; (2) the distress was intentionally or recklessly inflicted; and (3) they suffered actual severe emotional distress. *Rice v. Janovich,* 109 Wash.2d 48, 742 P.2d 1230, 1238 (1987); Restatement (Second) of Torts § 46 cmt. d (1965) (hereafter, "Restatement").

> To be outrageous conduct, it must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Restatement § 46 cmt. d; *see also Contreras v. Crown Zellerbach,* 88 Wash.2d 735, 565 P.2d 1173 (1977) (adopting cmt. d). It is not enough that the conduct was maliciously, tortiously or criminally intended.

Several factors bear on the determination whether the alleged conduct meets this standard:

(1) the position occupied by the defendants;

> (2) whether plaintiffs were particularly susceptible to emotional distress, and if defendant knew this fact;
>
> (3) whether defendants' conduct may have been privileged under the circumstances;
>
> (4) whether the degree of emotional distress caused by a party was severe as opposed to mere annoyance, inconvenience, or normal embarrassment; and
>
> (5) whether the actor was aware that there was a high probability that his or her conduct would cause severe emotional distress and proceeded in a conscious disregard of it.

Spurrell v. Bloch, 40 Wash.App. 854, 701 P.2d 529, 535, *review denied,* 104 Wash.2d 1014 (1985).

1. The discharge notations

The PINE FOREST's master entered the reason for discharge in each of the thirteen seafarer's books: "Requested repatriation upon filing wages claim to arrest vessel." This alone does not constitute outrageous conduct.

It is, rather, an accurate reflection of events. These thirteen men had requested repatriation after filing wage claims to arrest the vessel. Accurate statements about an employee's performance generally do not constitute outrage. *Dicomes v. State,* 113 Wash.2d 612, 782 P.2d 1002, 1013 (1989).

Furthermore, "[t]he actor is never liable . . . where he had done no more than insist upon his legal rights in a permissible way, even though he is well aware that such

insistence is certain to cause emotional distress." Restatement § 46 cmt. g. The master did no more than record an accurate statement of the reason for discharge and the conduct does not rise to the level of outrageous conduct.

2. The double-bookkeeping scheme

The seamen claim distress from their participation in the double-bookkeeping scheme. Yet they failed to show either that the conduct was outrageous or that they suffered any severe emotional distress.

Outrageous conduct far exceeds the bounds of decency. As the Restatement explains, it takes more than "mere insults, indignities, threats, annoyances, or petty oppressions, or other trivialities". Restatement § 46 cmt. d; *see also Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291, 295 (1975). Enlisting the men's help in deceiving the union may be objectionable, but it was not "beyond all possible bounds of decency and utterly intolerable in a civilized society." Restatement § 46 cmt. d.

Nor did these plaintiffs show that they suffered severe or extreme emotional distress, with objectively manifested symptoms. *Hansley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1103 (1976). More than the stress of everyday life must be shown. *Id.*; *see also Spurrell*, 701 P.2d at 535-36 (one sleepless night, tears, loss of appetite and anxiety is not severe emotional distress); *Lawson v. Boeing Co.*, 58 Wash.App. 261, 792 P.2d 545, 550-51 (1990) (loss of appetite, libido and energy, sleeplessness and increased headaches did not satisfy severe emotional distress element), *review denied*, 116 Wash.2d 1021, 811 P.2d 219

(1991). The court did not find any objectively manifested symptoms and the seafarers failed to allege them.

C. Blacklisting

The seamen say that by recording the reason for discharge in their seamen's books, the shipowners violated the prohibition against blacklisting.

Few courts have considered blacklisting claims. The Restatement explains blacklisting as

> intentionally and improperly interfer[ing] with another's prospective contractual relation- . . . whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Restatement § 766B. If the statement is true, however, it is not improper:

> One who intentionally causes a third person . . . not to enter into a prospective contractual relation with another does not interfere improperly . . . by giving the third person
>
> (a) truthful information, or
>
> (b) honest advice within the scope of a request for the advice.

Id. § 772; *see also id.* cmts. a, b.

The seamen do not dispute that the entries were accurate and true and their claim of blacklisting fails.

IV

Ordinarily, the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff to "go to court to get what was plainly owed him". *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 999, 8 L.Ed.2d 88 (1962).

The PINE FORST court awarded $564,737 in attorneys' fees, apportioned thus: $410,043 for the seamen discharged in the United States and $154,693 for those discharged overseas. We affirm that portion of the judgment awarding fees to the men discharged here and reverse the award to those discharged overseas.

The shipowners contend that they should not be required to pay any such fees, for they tendered the amount due shortly after the men left the ship. Yet they also pressed counterclaims for back wages paid, for the costs of what they thought was an excessive bond and for the costs of defending the action in the United States. We agree with the district court that the men discharged here had no choice but to seek the help of the court to retain the wages to which they were plainly entitled.

V

The judgment of dismissal in the SOUTHERN ASTER case is affirmed, as is the judgment denying intervention to the FIR GROVE seafarers. The parties will bear their own costs on appeal in both cases.

The PINE FOREST judgment is reversed, except for that portion of the judgment granting attorneys' fees to the men discharged in the United States. The parties will bear their own costs.

Nelson R. RABY, et al.,
Plaintiffs-Appellees,

v.

M/V PINE FOREST, In Rem, Delica Shipping, S.A., and Inui Steamship Co., Ltd., Defendants-Appellants.

No. 90-35618.

United States Court of Appeals,
Ninth Circuit.

Submitted August 31, 1990.

Decided Oct. 29, 1990.

Paul N. Wonacott and Kathleen A. McKeon, Wood, Tatum, Moser, Brooke & Landis, Portland, Or., for defendants-appellants.

Richard J. Dodson, Baton Rouge, La., for plaintiffs-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before WALLACE, THOMPSON and FERNANDEZ, Circuit Judges.

FERNANDEZ, Circuit Judge:

After a bench trial, the district court found in favor of the plaintiffs and fixed damages in the sum of $32,657,006. Since defendants sought to appeal and wished to stay execution, the district court then set the supersedeas bond at $59,000,000. Of that, $19,613,565 represented penalty wages which would accrue at the rate of $26,152 per day while the case was on appeal. 46 U.S.C. § 10313(g). Interest on the accruing portion was also

included. Defendants have asked that we reduce the amount of the bond.

We review the decision of the district court setting the amount of the bond for abuse of discretion. *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1505 n. 1 (9th Cir.1987).

Here we find an abuse of discretion because the district court erred when it failed to allow for the payment of the back wages into court, an event that would stop the running of penalties. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 n. 9, 102 S.Ct. 3245, 3252 n. 9, 73 L.Ed.2d 973 (1982); *Swain v. Isthmian Lines, Inc.*, 360 F.2d 81, 87-88 n. 26 (3rd Cir.1966); *Southern Cross Steamship Co. v. Firipis*, 285 F.2d 651, 659-60 (4th Cir. 1960), *cert. denied*, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859 (1961). That option ought to be available to defendants.

Our review of the district court's decision in this case suggests the possibility that the defendants have already tendered all or a part of the back wages, but the decision is far from clear in that respect. If all of the back wages owed to a particular plaintiff have been tendered, the penalty wages will have ceased to accrue as to that plaintiff's claim. We emphasize that penalty wages found to have accrued up to the date of tender of back wages need not themselves be tendered in order to preclude the accrual of further penalties.

We are aware that, under some circumstances, an appeal from a wage award may itself stop the accrual of penalties if the appeal is taken on strong and reasonable grounds. *Pacific Mail S.S. Co. v. Schmidt*, 241 U.S. 245, 250-51, 36 S.Ct. 581, 582-83, 60 L.Ed. 982 (1916). *See also*

Southern Cross Steamship Co. v. Firipis, 285 F.2d 659. However, in those cases the courts were able to comment upon the strength of the appeal after having the benefit of full briefing on the merits, and did so at the time of deciding the cases on the merits. The courts were not attempting to divine the strengths of the appeal before them in advance for the purpose of setting a supersedeas bond. Given the posture of this case and the complexity of the issues, we are unable to decide the merits of the wage claims at this early stage of the proceedings, and we are unwilling to speculate on the outcome of the appeal.

Based upon the above, we reverse the district court's order fixing the amount of the supersedeas bond insofar as it is based upon the projected accrual of penalty wages, and we remand to that court for the limited purpose of re-setting the bond. In so doing, the district court shall determine whether the full amount of back wages (not including penalty wages or interest) has been tendered to the plaintiffs, or to any of them. If so, penalty wages shall be deemed to have ceased to accrue for the affected plaintiffs as of the date of tender. If not, the penalties may be deemed to continue accruing until the back wages are tendered. As we have already stated tender includes payment into court.[1] The bond required of the defendants shall be reduced accordingly.

The stay of execution previously ordered by us shall remain in full force and effect without the further posting of bond until such time as the district court has entered

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[1] We hasten to add that nothing in this opinion is intended to suggest that all or any portion of the penalty wages, or back wages, should have been assessed against the defendants.

its order setting the bond in a manner not inconsistent with this opinion.

REVERSED as to the bond, and REMANDED for the limited purpose of setting a new bond.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NELSON R. RABY, et al., Plaintiff, -vs- M/V PINE FOREST, *In rem*, DELICA SHIPPING, S.A.; and INUI STEAMSHIP CO., LTD. Defendant.	NO. C90-5038T FINDINGS OF FACT CONCLUSIONS OF LAW AND JUDGMENT

THIS MATTER having come on for trial before the above-named court sitting without a jury, and plaintiffs being represented by counsel, and defendants being represented by counsel, and plaintiffs having produced evidence in support of their claims, and defendants having also produced evidence in this matter, and the court having heard and considered the argument of counsel, and the court being fully advised in this matter, now makes the following:

FINDINGS OF FACT

1. The plaintiffs are thirteen Filipino seafarers represented by individual counsel, and eight Filipino seamen represented by AMOSUP, (Associated Marine Officers and Seamen's Union of the Philippines). AMOSUP is authorized to assert its members' statutory wage claims. AMOSUP makes no claim of its own. All 21 seamen were employed to serve as seamen on board the M/V Pine

Forest, (defendant *in rem*) a vessel owned by defendant Delica Shipping, S.A., a Panamanian corporation, and flying the flag of the Republic of Vanuatu. The manager and operator of the vessel is defendant Inui Steamship Co., Ltd., a Japanese shipping company.

2. Plaintiffs Raby, Alvardo and Berido were the only plaintiffs who personally actually testified at the time of trial. The other ten plaintiffs did not personally appear in court. Their failure to personally appear does not appear to be of their own doing. The court therefore finds that they were "unavailable" for trial. In these circumstances the depositions of the absent plaintiffs are admissible under Rule 32 of the Federal Rules of Civil Procedure and Rule 804(B) of the Federal Rules of Evidence.

3. None of AMOSUP plaintiffs appeared at the time of trial. All eight (8) of AMOSUP plaintiffs were or are still in defendants' employ. These plaintiffs were, at all time relevant herein, under defendants' dominion and control.

4. The Philippine plaintiffs were recruited in Manila by Western Shipping Agency, a Philippine corporation and manning agent for defendants, Delica and Inui. The plaintiffs were being recruited for the first voyage of the M/V Pine Forest.

5. Each plaintiff signed an individual employment contract agreeing serve on board the M/V Pine Forest. The contracts were signed in blank by plaintiffs at the Western Shipping Office in Manila. There were no figures inserted therein for each plaintiffs' wages and, instead, the plaintiffs were told generally what the wage rates would be.

6. Each plaintiff joined the M/V Pine Forest in Japan on March 27, 1989, with the exception of plaintiffs Raby and Galua, who joined the vessel on July 22, 1989 and January 8, 1990 respectively. At that time, each plaintiff signed shipping articles on board the vessel that were in the substance and form prescribed by the Republic of Vanuatu. The shipping articles incorporated the Worldwide International Transport-Worker's Federation Collective Agreement and contained a significantly higher pay scale than the oral representations made to plaintiffs by Western Shipping Agency in Manila. The shipping articles set forth the base monthly wage next to each seafarers name and signature.

7. On September 14, 1989, unknown to plaintiffs, the shipowner through its agent, Western Shipping Co., Ltd. in Manila, entered into a joint JSU/AMOSUP Collective Bargaining Agreement. Defendants recognized AMOSUP as the exclusive collective bargaining representative of all the Filipino seamen aboard the M/V Pine Forest. The AMOSUP Collective Bargaining Agreement contained significantly lower wages than those contained in the shipping articles and ITF Collective Bargaining Agreement executed by the plaintiffs when they boarded the M/V Pine Forest.

8. The defendants executed the JSU/AMOSUP agreement for the sole purpose of obtaining an ITF blue certificate and to enroll the M/V Pine Forest with the ITF. At all times relevant hereto, defendants never obtained the "blue certificate." Thereafter, the Pine Forest traded exclusively between Japan and the Northwest coast of the United States.

9. From the date the plaintiffs joined the M/V Pine Forest until the vessel was arrested in Tacoma, Washington, on January 31, 1990, the vessel was called on United States ports a total of eight times, arriving on the following dates in 1989: April 9th, May 17th, June 22nd, August 1st, September 17th, October 26th, December 8th, and January 24, 1990. All of these voyages were between the United States and Japan.

10. The M/V Pine Forest carried logs and wood products from the Pacific Northwest to Japan. Upon returning to United States waters, it would discharge ballast and take on cargo. This court finds that ballast discharged is "cargo" as that term is used in 46 U.S.C. Section 10313(f). One hundred percent of the income of the M/V Pine Forest since its launching was earned from these voyages carrying wood products from the United States to Japan and back.

11. The plaintiffs were paid on a monthly basis. Each month the plaintiffs executed a pay voucher or "wage receipt" wherein each plaintiff certified he received the wages and benefits called for in the shipping articles and the ITF Collective Bargaining Agreement incorporated therein. Plaintiff never received the wages specified in the Shipping Articles.

12. The shipowner also required the plaintiffs to sign a separate receipt for wages actually paid by the master and received by each plaintiff. This practice is referred to by defendants as the keeping of "double books." At least one instance of double-bookkeeping occurred in the United States while the vessel was in Longview, Washington.

13. Defendants admit that they never intended to comply with the shipping articles and ITF wage scale. The conduct of defendants in the practice of double-bookkeeping and in its refusal to pay plaintiffs their rightful wages was fraudulent, intentional, and in bad faith. The seamen were in a very vulnerable position and were easily intimidated.

14. Plaintiffs signed receipts for the wages specified in the shipping articles while in the United States waters only once, but defendants knew that all of the monthly wage receipts stipulating the higher wages were on board the M/V Pine Forest each time plaintiffs wages were wrongfully withheld at the end of eight separate voyages to United States waters.

15. In these circumstances, plaintiffs' execution of the shipping articles and their signing the wage receipts for the wages set forth in the shipping articles constituted a legally sufficient demand for payment of wages.

16. Plaintiffs' demand for wages and for the defendants' illegal withholding of wages occurred while both plaintiffs and the M/V Pine Forest were in the U.S. Harbors or waters at the end of eight separate voyages from Japan to the United States.

17. The defendants' fraudulent actions requiring plaintiffs to sign two sets of conflicting wage receipts was a repudiation of their contractual obligation to pay plaintiffs the wages specified in the shipping articles, and discharged, by operation of law, plaintiffs duty to make formal demand for wages.

18. Application of 46 U.S.C. Section 10313(e) was triggered when plaintiffs' demand for payment of half wages earned and unpaid at each port at which the vessel discharged ballast was refused. Application of 46 U.S.C. Section 10313(f) was triggered when, at the end of a voyage, plaintiffs were not paid the balance of wages owing.

19. On January 31, 1989, the M/V Pine Forest was arrested in Tacoma, Washington. All plaintiffs except Silverio and Cabiltan were aboard the vessel. Plaintiffs were claiming back due wages in accordance with the ITF shipping articles they had executed and which were their contract of employment.

20. On February 13, 1990, the total sum of $267,585.65 was tendered by defendants to the original thirteen plaintiffs for wages claimed through January 24, 1990, but the tender did not include penalty wages. The amount tendered did not include $15,019.20 in wages earned by the seamen between January 24th and February 8th, the date of final discharge which amount was claimed in plaintiffs' amended complaints for back wages. Payments were made without admission of liability and with reservations of right to collect same if court found in favor of defendants. Penalty wages are included in the definition of wages. Defendants have failed to show sufficient cause for withholding payment of penalty wages once back due wages were paid in February of 1990.

21. At the time the thirteen original plaintiffs signed off the M/V Pine Forest in Tacoma, Washington, defendants directed the captain to make a notation in each

plaintiffs' Seamen's Book in the column entitled "Reason for Discharge:" "Requested repatriation upon filing wage claim to arrest vessel."

22. These notations in the plaintiffs' Seamen's Books rendered them unemployable in the Philippines as merchant seamen and they have been effectively "black-listed" from obtaining future employment on ocean-going vessels.

23. It was the intent of the defendants, when the notations were made, to punish the plaintiffs for having made a claim for their wages by entering the above-notations and making them unemployable as merchant seamen.

24. After the repatriation of the thirteen original plaintiffs to the Republic of the Philippines, none of them were able to find employment as seamen because of the notations made in each plaintiffs' Seamen's Books. At least four of the plaintiffs were personally refused employment.

25. The plaintiffs are not able to obtain new Seamen's Books because of the applicable regulations of the Philippine Coast Guard and will not be able to do so in the future.

26. Any overtime worked by plaintiffs never appeared in the ship's log.

27. Defendants ordered the captain of the M/V Pine Forest to alter the ship's shipping articles. The captain then ordered the chief engineer to actually alter the articles.

28. All of the other defendants' ships have been and are now operated in the same manner as the M/V Pine Forest as to the payment of seamen's wages and double bookkeeping.

29. Before the M/V Pine Forest left Tacoma, after the arrest, six of the AMOSUP plaintiffs executed documents entitled "Voluntary Dismissals" prepared by defense counsel with plaintiffs' signatures procured by the master of the vessel. The court finds that these documents were executed by plaintiffs under conditions of intimidation and coercion, and, therefore, they have no legal effect.

30. The court finds that each trip of the M/V Pine Forest from Japan to the United States was a "voyage" as that term is used in 46 U.S.C. Section 10313.

31. This court finds that the conduct by defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable. That such conduct by the defendants was to intimidate, coerce and punish the plaintiffs. That such conduct was in complete disregard of the plaintiffs' rights. That defendants' conduct at all times relevant herein, violates the laws and public policy of the United States. The plaintiffs herein are entitled under statute and general maritime law of the United States to the protection of the courts.

32. The facts and circumstances in this case have convinced this court that plaintiffs are entitled to punitive damages in such an amount as will punish the defendants to stop their past, continuing and ongoing tortious conduct in operation of the M/V Pine Forest and those other

ships that they operate that sail into any port in the United States. That the awarding of punitive damages against the defendants will serve to punish defendants for their conduct and to deter others from following defendants' example.

33. The thirteen (13) Original Plaintiffs are entitled to back pay including penalty wages as follows:

13 ORIGINAL PLAINTIFFS	BACK WAGES	PENALTIES (as of 5/21/90)
Camilo Alvarado	$ 7,235.88	$ 597,706.96
Nelson Raby	2,894.19	205,187.25
Teofaniz Roz	1,555.95	480,685.44
Apolonio Torreliza	1,621.29	480,685.44
Leo Ajero	1,762.72	463,426.56
Teodoro Rabie	2,894.19	280,613.44
Modesto Berido	875.91	280,613.44
Marcelo Suarez	875.91	280,613.44
Miguelto Cabales	1,240.61	280,613.44
Teodoro Marquez	548.26	210,381.76
Leonardo Bonnit	626.19	210,381.76
Hermenigildo Banogon	938.79	210,381.76
Cervasito P. Laxina	626.19	210,381.76

34. The eight (8) AMOSUP plaintiffs are entitled to back wages and penalties as follows:

S. Galua	$ 2,686.90	$ 26.329.68
Bonifacio Tabada	9,551.57	480,685.44
Can Machete	29,175.90	463,462.56

Francisco Yabo	$ 18,096.49	$ 311,428.80
Guelberto Bete	16,065.54	280,613.44
G. Villaruel	16,065.54	280,613.44
Russel Silrerio	20,044.20	391,924.43
Mario Cabiltan	30,549.91	564,404.72

35. The thirteen (13) Original Plaintiffs are entitled to compensatory damages which includes loss of future income and mental distress, as follows:

13 ORIGINAL PLAINTIFFS:	LOSS OF FUTURE INCOME	EMOTIONAL DISTRESS
Camilo Alvarado	$ 950,586.00	$ 100,000.00
Nelson Raby	892,534.00	100,000.00
Teofaniz Roz	649,665.00	100,000.00
Apolonio Torreliza	554,737.00	100,000.00
Leo Ajero	676,302.00	100,000.00
Teodoro Rabie	379,260.00	100,000.00
Modesto Berido	390,009.00	100,000.00
Marcelo Suarez	464,441.00	100,000.00
Miguelito Cabales	480,301.00	100,000.00
Teodoro Marquez	360,091.00	100,000.00
Leonardo Bonnit	353,874.00	100,000.00
Hermenigildo Banogon	341,649.00	100,000.00
Guelberto P. Laxina	307,021.00	100,000.00

36. The eight (8) AMOSUP plaintiffs are entitled to compensatory damages for mental distress as follows:

AMOSUP PLAINTIFFS:	LOSS OF FUTURE INCOME	EMOTIONAL DISTRESS
S. Galua	NONE	$ 50,000.00
Bonifacio Tabada	NONE	50,000.00
Can Machete	NONE	50,000.00
Francisco Yabo	NONE	50,000.00
Guelberto Bete	NONE	50,000.00
G. Villaruel	NONE	50,000.00
Russel Silrerio	NONE	50,000.00
Mario Cabiltan	NONE	50,000.00

37. All plaintiffs are entitled to punitive damages as follows:

13 ORIGINAL PLAINTIFFS:	PUNITIVE DAMAGES
Camilo Alvarado	$ 1,000,000.00
Nelson Raby	1,000,000.00
Teofaniz Roz	1,000,000.00
Apolonio Torreliza	1,000,000.00
Leo Ajero	1,000,000.00
Teodoro Rabie	1,000,000.00
Modesto Berido	1,000,000.00
Marcelo Suarez	1,000,000.00
Miguelito Cabales	1,000,000.00
Teodoro Marquez	1,000,000.00
Leonardo Bonnit	1,000,000.00
Hermenigildo Banogon	1,000,000.00
Cervasito P. Laxina	1,000,000.00
AMOSUP PLAINTIFFS:	
S. Galua	500,000.00
Bonifacio Tabada	500,000.00
Can Machete	500,000.00
Francisco Yabo	500,000.00
Guelberto Bete	500,000.00

G. Villaruel	$ 500,000.00
Russel Silrerio	500,000.00
Mario Cabiltan	500,000.00

38. The plaintiffs, as the prevailing party herein, are entitled to be awarded reasonable attorneys' fees, and interest.

The court finds the foregoing Findings of Fact to have been shown by a preponderance of the evidence in this matter.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

All Findings of Fact more appropriately termed Conclusions of Law will be incorporated as such.

1. This court has jurisdiction of this matter under the United States Constitution Article III pursuant to federal Admiralty and Maritime jurisdiction; 28 U.S.C. Section 1333; and pursuant to 46 U.S.C. Section 10313(i) of the Shipping Code.

2. That defendant vessel and plaintiffs were located in Tacoma, Pierce County, Washington at the time of the filing of the complaint herein.

3. Federal law rather than State of Washington law controls damage issues when the cause of action arises under Federal Maritime Law.

4. All of plaintiffs' claims for back wages, including penalty wages, compensatory damages for tort, and punitive damages are properly before this court. Defendants'

intentional, fraudulent, bad faith conduct is a maritime tort resulting in a maritime lien for compensatory and punitive damages.

5. The tolling of the statute of limitations does not occur until back due wages and penalties have been paid in full.

6. The seamen are entitled to two days' wages for each day payment was withheld from the date of each wrongful withholding until full wages and penalties wages are paid. Penalty wages will continue to accrue at two times each plaintiff's rate of pay until the actual payment is received. Those plaintiffs hereinafter mentioned are awarded as back pay including penalties the following sums of money:

13 ORIGINAL PLAINTIFFS	BACK WAGES	PENALTIES
Camilo Alvarado	$ 7,235.88	$ 597,706.96
Nelson Raby	2,894.19	205,187.25
Teofaniz Roz	1,555.95	480,685.44
Apolonio Torreliza	1,621.29	480,685.44
Leo Ajero	1,762.72	463,426.56
Teodoro Rabie	2,894.19	280,613.44
Modesto Berido	875.91	280,613.44
Marcelo Suarez	875.91	280,613.44
Miguelto Cabales	1,240.61	280,613.44
Teodoro Marquez	548.26	210,381.76
Leonardo Bonnit	626.19	210,381.76
Hermenigildo Banogon	938.79	210,381.76

Cervasito P. Laxina	$ 626.19	$ 210,381.76
AMOSUP PLAINTIFFS:		
S. Galua	2,686.90	26,329.68
Bonifacio Tabada	9,551.57	480,685.44
Can Machete	29,175.90	463,462.56
Francisco Yabo	18,096.49	311,428.80
Guelberto Bete	16,065.54	280,613.44
G. Villaruel	16,065.54	280,613.44
Russel Silrerio	20,044.20	391,924.43
Mario Cabiltan	30,549.91	564,404.72

7. Those plaintiffs hereinafter mentioned are awarded as compensatory damages for the outrageous, malicious and intentional conduct of the defendants, especially, but not limited to, the entry of the notations in the thirteen Seamen's Books. The making of the notations made the thirteen Seamen unemployable. That such conduct of the defendants was for retaliation and punishment of the plaintiffs for requesting what they were lawfully entitled to, their wages. Defendants' conduct at all times relevant herein, caused plaintiffs duress, emotional distress, and prevented them from being employable as seamen.

13 ORIGINAL PLAINTIFFS:	**LOSS OF FUTURE INCOME**	**EMOTIONAL DISTRESS**
Camilo Alvarado	$ 950,586.00	$ 100,000.00
Nelson Raby	892,534.00	100,000.00
Teofaniz Roz	649,665.00	100,000.00
Apolonio Torreliza	554,737.00	100,000.00

Leo Ajero	$ 676,302.00	$ 100,000.00
Teodoro Rabie	379,260.00	100,000.00
Modesto Berido	390,009.00	100,000.00
Marcelo Suarez	464,441.00	100,000.00
Miguelito Cabales	480,301.00	100,000.00
Teodoro Marquez	360,091.00	100,000.00
Leonardo Bonnit	353,874.00	100,000.00
Hermenigildo Banogon	341,649.00	100,000.00
Guelberto P. Laxina	307,021.00	100,000.00

AMOSUP PLAINTIFFS:	LOSS OF FUTURE INCOME	EMOTIONAL DISTRESS
S. Galua	NONE	$ 50,000.00
Bonifacio Tabada	NONE	50,000.00
Can Machete	NONE	50,000.00
Francisco Yabo	NONE	50,000.00
Guelberto Bete	NONE	50,000.00
G. Villaruel	NONE	50,000.00
Russel Silrerio	NONE	50,000.00
Mario Cabiltan	NONE	50,000.00

8. That plaintiffs hereinafter mentioned are awarded punitive damages under general maritime law because of the callous, deliberate, unconscionable, reckless, indifferent, intentional, flagrant, fraudulent, unlawful and malicious conduct of defendants' agents at all times relevant herein. The evidence is clear and convincing and beyond a preponderance of the evidence that defendants' agents were at all times acting within the scope of their employment and were acting for and at the direction of the defendants.

13 ORIGINAL PLAINTIFFS:	PUNITIVE DAMAGES
Camilo Alvarado	$ 1,000,000.00
Nelson Raby	1,000,000.00
Teofaniz Roz	1,000,000.00
Apolonio Torreliza	1,000,000.00
Leo Ajero	1,000,000.00
Teodoro Rabie	1,000,000.00
Modesto Berido	1,000,000.00
Marcelo Suarez	1,000,000.00
Miguelito Cabales	1,000,000.00
Teodoro Marquez	1,000,000.00
Leonardo Bonnit	1,000,000.00
Hermenigildo Banogon	1,000,000.00
Cervasito P. Laxina	1,000,000.00

AMOSUP PLAINTIFFS:	PUNITIVE DAMAGES
S. Galua	500,000.00
Bonifacio Tabada	500,000.00
Can Machete	500,000.00
Francisco Yabo	500,000.00
Guelberto Bete	500,000.00
G. Villaruel	500,000.00
Russel Silrerio	500,000.00
Mario Cabiltan	500,000.00

9. Defendants are entitled to an offset in the amount of $267,585.65.

10. Any and all documents signed by plaintiffs herein after the arrest of the vessel are null and void and have no legal effect. Plaintiffs have shown good cause pursuant to 46 U.S.C. Section 10313(e), and the Voluntary Dismissals are hereby set aside.

11. In accordance with 46 U.S.C. 10313, prejudgment interest is awarded to the plaintiffs on the award of

back wages and on penalty wages, on the date when the wages first came due, i.e., when the ship entered United States waters. Interest shall begin to run on the compensatory and punitive damages as of the date of entry of judgment herein.

13. Interest is awarded and shall accrue in accordance with 28 U.S.C. Section 1961. Judgment is entered against the defendants, the M/V Pine Forest *in rem* and Delica Shipping, S.A. and Inui Steamship Co. Ltd., jointly and severally *in personam* for plaintiffs' compensatory and punitive damages, back wages, penalty wages, and for reasonable attorneys' fees, interest and costs.

14. Plaintiffs as the prevailing party herein shall be awarded reasonable attorneys' fees in an amount to be determined at a later date. Award of attorneys' fees is predicated on defendants' bad faith and is proper under *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962).

15. The plaintiffs shall recover their costs and expenses in such sums as are determined by the clerk of the court.

16. Judgment is further entered for additional penalty wages which shall continue to accrue for each plaintiff seaman from May 21, 1990, at two (2) times each plaintiff's daily rate of pay until actual receipt of payment. The exact amount of these additional penalty wages shall be computed at the time of payment.

DATED this 6th day of AUGUST 1990.

/s/ Josh E. Tanner
UNITED STATES DISTRICT
JUDGE

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I. HYEON SU; JO SEONG GU, et al.; GIM YEONG HO; PARK MIN HO, et al.; BARG YEONG PAL; SEO JEOM TAE; LEE SIL GWANG; JUNG JU GOANG; JI JE JE; O HAN SEON; SON CHI IL; CHOI WEON IL; CHU CHAE SOK; KIG OG NAM; HAN BAG KIL; PYEON YUN SU; PARK SUNG OK; KA CHAE HO; FEDERATED KOREAN SEAMEN'S UNION, et al.,

Plaintiffs-Appellants,

v.

M/V SOUTHERN ASTER; SOUTHERN ASTER NAVIGATION, S.A.,

Defendants-Appellees.

Nos. 90-35485
90-35486

D.C. No.
CV-90-165-MA

NELSON R. RABY; TEOFANIS F. ROZ; APOLONIO H. TORRELIZA; ASSOCIATED MARINE OFFICERS & SEAMAN'S UNION OF THE PHILIPPINES; S. GALUA; BOIFACIO C. TABADA, et al; LEO C. AJERO; TEODULO R. RABIE; MARCELO G. SUAREZ; MIGUELITO A. CABALES, et al.,

Plaintiffs-Appellees,

v.

M/V PINE FOREST; DELICA SHIPPING, S.A.; INUI STEAMSHIP CO., LTD.,

Defendants-Appellants.

Nos. 90-35618
90-35879
91-35375

D.C. No.
CV-90-5038-JET

ORDER
(Filed
Dec. 9, 1992)

Before: WRIGHT, BEEZER, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Beezer and Leavy have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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46 U.S.C. § 10313. Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman –

> **(1)** unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

(Pub.L. 98-89, Aug. 26, 1983, 97 Stat. 566; Pub.L. 99-640, § 10(b)(4), Nov. 10, 1986, 100 Stat. 3550.)